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THE GENERAL STATUTES OF NORTH CAROLINA

Constitutions and Appendix

PREPARED UNDER THE SUPERVISION OF THE DEPARTMENT OF JUSTICE
OF THE STATE OF NORTH CAROLINA

Annotated, under the Supervision of the Department of Justice,
by the Editorial Staff of the Publishers

Under the Direction of

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Volume 4A

1970 REPLACEMENT VOLUME

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THE GENERAL STATUTES OF
NORTH CAROLINA

Consolidated and Annotated

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BY

THE MICHIE COMPANY

Volume 4A

1970 Reissue of Volume 4

Scope of Volume

Constitutions:

Constitution of North Carolina.
Constitution of the United States.

Statutes:

Federal statutes relating to authentication of records and removal of causes.

Rules:

Rules of Practice in General Court of Justice.
Rules of Practice in United States District Courts.
Federal Rules of Civil Procedure relating to authentication of records and removal of causes.
Rules relating to extradition requisitions.
Rules, etc., of North Carolina State Bar.
Canons of Ethics of North Carolina State Bar.
Regulations relating to appointment of counsel for indigent defendants.
Rules governing admission to practice of law.
Supreme Court Library Rules.

Annotations:

Sources of annotations to the North Carolina Constitution and the rules of practice in State courts:
North Carolina Reports volumes 1-276 (p. 727).
North Carolina Court of Appeals Reports volumes 1-9 (p. 171).
Federal Reporter volumes 1-300.
Federal Reporter 2d Series volumes 1-429 (p. 992).
Federal Supplement volumes 1-315 (p. 320).
United States Reports volumes 1-399 (p. 526).
Supreme Court Reporter volumes 1-90 (p. 2354).
North Carolina Law Review volumes 1-48.
Wake Forest Intramural Law Review volumes 2-5.
Opinions of the Attorney General.

Tables.

Preface

Volume 4A has been recompiled so that the new rules of court, extradition material and particularly the new Constitution could be included within the book and so that the substantial material in the supplement could be integrated into the main volume.

Those who use the General Statutes are cautioned to keep their old Volume 4A with the most recent supplement in order to retain the provisions of the old Constitution which will remain in effect until July 1, 1971, and will, of course, be useful as a research tool thereafter.

Where the table of comparative sections between the 1868 and 1970 Constitutions indicated similarity of provisions, The Michie Company was instructed to pick up annotations under the 1868 Constitution sections and carry them as annotations to the 1970 Constitution with an appropriate note that those decisions were made by the courts under the old Constitution.

The recompiled volume has been prepared and published under the supervision of the Department of Justice of the State of North Carolina. The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes, and any suggestions they may have for improving them, to the Department.

ROBERT MORGAN,
Attorney General

December 29, 1970

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Adopted November 3, 1970, with Amendments through 1970

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Editor's Note.—Session Laws 1969, c. 1258, proposed a complete editorial revision of the Constitution of North Carolina, to be submitted to the qualified voters of the State at the 1970 general election. The revised Constitution was adopted by vote of the people at the general election held Nov. 3, 1970, to take effect July 1, 1971. In addition to the new Constitution, six other constitutional amendments were submitted to the voters at the 1970 general election, to be voted on independently, and five of these were adopted. The effect of these amendments is indicated in notes under the sections affected.

Where appropriate, annotations construing various sections of the Constitution of 1868 have been placed under corresponding sections of the new Constitution.

PREAMBLE

We, the people of the State of North Carolina, grateful to Almighty God, the Sovereign Ruler of Nations, for the preservation of the American Union and the existence of our civil, political and religious liberties, and acknowledging our dependence upon Him for the continuance of those blessings to us and our posterity, do, for the more certain security thereof and for the better government of this State, ordain and establish this Constitution.

Editor's Note.—The provisions of the Preamble are similar to those of the Preamble, Const. 1868.

ARTICLE I

DECLARATION OF RIGHTS

That the great, general, and essential principles of liberty and free government may be recognized and established, and that the relations of this State to the Union and government of the United States and those of the people of this State to the rest of the American people may be defined and affirmed, we do declare that :

Section 1. *The equality and rights of persons.* We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.

Editor's Note.—The provisions of this section are similar to those of Art. I, § 1, Const. 1868, and the cases in the following annotation were decided under that section.

For article on the continuous revision of the Constitution, see 36 N.C.L. Rev. 297 (1958).

For case law survey as to constitutional law, see 45 N.C.L. Rev. 855 (1967).

For comment on the public purpose doctrine, see 3 Wake Forest Intra. L. Rev. 37 (1967).

Meaning of "Liberty". — The term "liberty," as used in this section and § 19 of this article, does not consist simply of the right to be free from arbitrary physical restraint or servitude, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. It includes the right of the citizen to be free to use his faculties in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or vocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out these purposes to a successful conclusion. *State v. Ballance*, 229 N.C. 764, 51 S.E.2d 731 (1949).

"Liberty" Qualified by Common-Law Doctrines. — It is a recognized principle that a personal liberty is a constitutional right, and any act of Assembly which violates this right is not the law of the land

and would be void by § 19 of this article. However, the meaning of general expressions such as "liberty" is qualified by the doctrines of the common law, and which as modified to suit our institutions, have been held a part of the law of this State. *London v. Headen*, 76 N.C. 72 (1877).

Same—Penalty for Refusing to Accept Office.—It is a doctrine of the common law that every citizen in peace, as well as in war, owes his services to the State when they are demanded, and a legislative enactment prescribing a penalty of \$25 against any person who is duly elected or appointed town constable and who refuses to qualify is not violative of § 19 of this article, which is a protective provision of the personal liberty referred to in this section. *London v. Headen*, 76 N.C. 72 (1877).

This section does not preclude the legislature from making classifications and distinctions in the application of laws provided they are reasonable and just and not arbitrary. *Motley v. State Bd. of Barber Exmrs.*, 228 N.C. 337, 45 S.E.2d 550, 175 A.L.R. 253 (1947).

The police power may be exercised in the form of State legislation where otherwise the effect may be to invade rights granted by the Fourteenth Amendment only when such legislation bears a real and substantial relationship to the public health, safety, morals or some other phase of the public welfare. *State v. Anderson*, 275 N.C. 168, 166 S.E.2d 49 (1969).

Occupational Qualifications.—While the

legislature, in the exercise of the State police power, may protect the public against incapacity, fraud and oppression by establishing standards of personal fitness and requiring the examination and licensing of those desiring to engage in the learned professions and occupations requiring scientific or technical knowledge or skill, or which involve a trust relationship with the public, it may not impose such restrictions upon those wishing to engage in the ordinary trades or occupations which are harmless in themselves, since the right to choose and pursue a means of livelihood is a property right and a personal liberty guaranteed by the Constitution, which right may be interfered with only when necessary to the protection of the public safety or welfare. *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854, 128 A.L.R. 658 (1940).

Right to Earn Livelihood as Restaurant Not Infringed by Statutes Controlling Alcoholic Beverages. — The constitutional right to earn a livelihood by engaging in the restaurant business is not infringed by either the Turlington Act or the ABC Act. *D & W, Inc. v. City of Charlotte*, 268 N.C. 577, 151 S.E.2d 241 (1966).

Statute making certain war veterans eligible for license to practice barbering without being examined does not violate this section. *Motley v. State Bd. of Barber Exmrs.*, 228 N.C. 337, 45 S.E.2d 550, 175 A.L.R. 253 (1947).

Statute Regulating Practice of Optometry.—A portion of G.S. § 90-115, relating to the practice of optometry, was held violative of this section. *Palmer v. Smith*, 229 N.C. 612, 51 S.E.2d 8 (1948).

Statute providing for the licensing and supervision of photographers is violative of this section. *State v. Ballance*, 229 N.C. 764, 51 S.E.2d 731 (1949), overruling *State v. Lawrence*, 213 N.C. 674, 197 S.E. 586, 116 A.L.R. 1366 (1938).

Statute Providing for Tile Contractor's License.—Section 87-28 et seq. of the General Statutes, requiring a license for any person, firm or corporation undertaking to lay, set or install ceramic tile, marble or terrazzo floors or walls, violates this section. *Roller v. Allen*, 245 N.C. 516, 96 S.E.2d 851 (1957).

"Grandfather Clause" in Statute Authorizing Counties to Grant Franchises to Ambulance Operators.—Paragraph a 2 of G.S. § 153-9 (58) is unconstitutional since, because of the possible retroactive application of the grandfather rights provided for, it invades the personal and property rights guaranteed and protected by Art. I, §§ 1, 19, 32 and 34, of the Constitution. *Whaley*

v. Lenoir County, 5 N.C. App. 319, 168 S.E.2d 411 (1969).

Statute Regulating Junk Yards. — See note to G.S. § 14-399.

Statute Making Insurance Carrier of Assigned Risk Policy Absolutely Liable. — Subsection (f) (1) of G.S. § 20-279.21 when applied to an assigned risk insurance policy issued in compliance with the plan set forth in § 20-279.34 and regulations pursuant thereto, does not deprive an insurance company of its property without due process of law and otherwise than by the law of the land in contravention of the Fourteenth Amendment to the Constitution of the United States, this section, and § 19 of this article. *Jones v. State Farm Mut. Auto. Ins. Co.*, 270 N.C. 454, 155 S.E.2d 118 (1967).

Requiring Insurance Company to Pay Default Judgment Obtained against Insured under Assigned Risk Policy. — An insurance company who has been required to issue an assigned risk policy in accordance with G.S. § 20-279.34, is not denied due process in violation of the Fourteenth Amendment of the federal Constitution or in violation of this section and § 19 of this article by being required to pay an injured third party damages established by a default judgment obtained against its insured, even though insurer had no notice of the accident or the action against its insured, nothing else appearing and there being no question of collusion between insured and the injured third party. *Jones v. State Farm Mut. Auto. Ins. Co.*, 270 N.C. 454, 155 S.E.2d 118 (1967).

Default Judgment Restraining Pastor from Appearing at Church.—A judgment by default final restraining defendant, whom a majority of the members of a church had voted not to employ as its pastor after the year 1959, from appearing at the church after the year 1959 and acting or attempting to act as its pastor at a religious service or at any other church meeting, so long as he is not its pastor, violates no rights guaranteed to him by this article. *Collins v. Simms*, 254 N.C. 148, 118 S.E.2d 402 (1961); *Collins v. Simms*, 257 N.C. 1, 125 S.E.2d 298 (1962).

Local bond issue of town of Lake Lure held not to violate this section. *Keeter v. Town of Lake Lure*, 264 N.C. 252, 141 S.E.2d 634 (1965).

Compulsory vaccination is a valid exercise of governmental police power for the public welfare, health and safety, but if there are exceptional cases, where owing to the peculiar state of the health or system, vaccination would be dangerous, then the legislature cannot validly compel the per-

son to submit to such protective measure, since this would be in violation of the rights recognized by this section as pre-existing and inherent in the individual. *State v. Hay*, 126 N.C. 999, 35 S.E. 459 (1900).

Statute Requiring Motorcycle Operator to Wear Protective Helmet.—The require-

ment of G.S. § 20-140.2 (b) that the operator of a motorcycle on a public highway wear a protective helmet is constitutional as a valid exercise of the police power since the statute bears a real and substantial relationship to public safety. *State v. Anderson*, 275 N.C. 168, 166 S.E.2d 49 (1969).

Sec. 2. *Sovereignty of the people.* All political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.

Editor's Note. — The provisions of this section are similar to those of Art. I, § 2, Const. 1868, and the cases in the following annotation were decided under that section.

In General. — In construing the provisions of the Constitution in regard to elections it should be kept in mind that this is a government of the people in which the will of the people—the majority—legally expressed, must govern and that these provisions should be liberally construed, that tend to promote a fair election, or expression of this popular will. *State ex rel. Quinn v. Lattimore*, 120 N.C. 426, 26 S.E. 638 (1897).

Repeal of Laws. — It is axiomatic that

since all political power is derived from the people and all government originates from them, the sovereign power of the people, expressed through their chosen representatives in the General Assembly, is supreme, and a law by them enacted may not be set aside by the courts unless it contravenes some prohibition or mandate of the Constitution by which the people of the State have elected to be limited and and restrained, or unless it violates some provision of the granted powers of federal government contained in the Constitution of the United States. *State v. Warren*, 211 N.C. 75, 189 S.E. 108 (1937).

Sec. 3. *Internal government of the State.* The people of this State have the inherent, sole, and exclusive right of regulating the internal government and police thereof, and of altering or abolishing their Constitution and form of government whenever it may be necessary to their safety and happiness; but every such right shall be exercised in pursuance of law and consistently with the Constitution of the United States.

Editor's Note. — The provisions of this section are similar to those of Art. I, § 3, Const. 1868, and the cases in the following annotation were decided under that section.

The Constitution of the United States takes precedence over the Constitution of North Carolina. *Constantian v. Anson County*, 244 N.C. 221, 93 S.E.2d 163 (1956).

Duty to Follow Decisions of United States and State Supreme Courts. — It is the duty of the Supreme Court of the State to follow the decisions of the Supreme Court of the United States, upon questions involved in interstate commerce where

Congress has assumed control of the matter relating thereto, and involved in the litigation. But in intrastate cases, the decisions of the State Supreme Court are binding and will be followed in the United States Supreme Court though they appear "absurd and illogical." *Norris v. Western Union Tel. Co.*, 174 N.C. 92, 93 S.E. 463 (1917).

Regulation of Criminal Practice. — The legislature has power to shape the criminal procedure of the State to provide remedies required by the exigencies of the present time. *State v. Lewis*, 142 N.C. 626, 35 S.E. 600 (1906).

Sec. 4. *Secession prohibited.* This State shall ever remain a member of the American Union; the people thereof are part of the American nation; there is no right on the part of this State to secede; and all attempts, from whatever source or upon whatever pretext, to dissolve this Union or to sever this Nation, shall be resisted with the whole power of the State.

Editor's Note.—The provisions of this section are similar to those of Art. I, § 4, Const. 1868.

Sec. 5. *Allegiance to the United States.* Every citizen of this State owes paramount allegiance to the Constitution and government of the United States, and no law or ordinance of the State in contravention or subversion thereof can have any binding force.

Editor's Note.—The provisions of this section are similar to those of Art. I, § 5, Const. 1868, and the cases in the following annotation were decided under that section.

The Constitution of the United States takes precedence over the Constitution of North Carolina. *Constantian v. Anson*

County, 244 N.C. 221, 93 S.E.2d 163 (1956).

The delegation of authority to counties to construct water and sewer systems, contained in G.S. § 153-9, subdivision (46), does not violate this section. *Ramsey v. Rollins*, 246 N.C. 647, 100 S.E.2d 55 (1957).

Sec. 6. *Separation of powers.* The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.

Editor's Note. — The provisions of this section are similar to those of Art. I, § 8, Const. 1868, and the cases in the following annotation were decided under that section.

For note on judicial review and separation of powers, see 45 N.C.L. Rev. 467 (1967).

For case law survey as to separation of powers, see 45 N.C.L. Rev. 891 (1967).

Generally.—Each of the coordinate departments has its appropriate functions, and one cannot control the action of the other, in the sphere of its constitutional power and duty. *State v. Holden*, 64 N.C. 829 (1870); *Person v. Board of State Tax Comm'rs*, 184 N.C. 499, 115 S.E. 336 (1922).

This section has been said to embody succinctly the judgment of the people of North Carolina in regard to "the great principle of the separation of the powers." *Long v. Watts*, 183 N.C. 99, 110 S.E. 765, 22 A.L.R. 277 (1922).

From this unique political division results our elaborate system of checks and balances—a complication and refinement which repudiates all hereditary tendencies and makes the law supreme. In short, it is one of the distinct American contributions to the science of government; and the judiciary—the department of trial and judgment—of all others, without hesitation or turning, should hold fast to the basic principle upon which this government is founded. The courts are vested with judicial powers only, and it is no part of their function to change or to amend the criminal statutes enacted by the legislature. *State v. Bell*, 184 N.C. 701, 115 S.E. 190 (1922) (dissenting opinion).

It is settled and fundamental in North Carolina law that the legislature may not abdicate its power to make laws nor delegate its supreme legislative power to any other coordinate branch or to any agency which it may create. *State Educ. Assis-*

tance Authority v. Bank of Statesville, 276 N.C. 576, 174 S.E.2d 551 (1970).

The propriety of ordering sales of lands upon petition of the owner is purely a judicial duty, and any private act of the General Assembly attempting to regulate the same is void under this section. *Miller v. Alexander*, 122 N.C. 718, 30 S.E. 125 (1898).

Where Office Created by Legislature.—It is competent for the legislature in creating an office, other than purely judicial, to reserve to itself the right to remove, or to the Governor to suspend, the incumbent of the office. *State ex rel. Caldwell v. Wilson*, 121 N.C. 425, 28 S.E. 554 (1897).

Creation of Board with Quasi-Judicial Functions.—The creation by the legislature of a board or municipal corporation and the conferring upon such board or municipal corporation quasi-judicial and administrative functions does not violate this provision. *Cox v. City of Kinston*, 217 N.C. 391, 8 S.E.2d 252 (1940).

Court Practice Regulated by Judicial Department.—Under the Constitution, the supreme judicial power being independent of the other departments, the legislature cannot prescribe rules of practice for the Supreme Court; nevertheless, the courts have copied, almost verbatim, the provisions of the Code. *Herndon v. Imperial Fire Ins. Co.*, 111 N.C. 384, 16 S.E. 465 (1892); *Bird v. Gilliam*, 125 N.C. 76, 34 S.E. 196 (1899). And where there is conflict, the rules made by the court will be observed. *Cooper v. Board of Comm'rs*, 184 N.C. 615, 113 S.E. 569 (1922).

The independence of the Supreme Court only (and not of the entire judicial department) is provided for by this section. But there is nothing which gives the Supreme Court supervisory control over the legislature. *Walser ex rel. Wilson v. Jordan*, 124 N.C. 683, 33 S.E. 139 (1899).

The Supreme Court has the sole right to prescribe rules of practice and procedure

therein. *Lee v. Baird*, 146 N.C. 361, 59 S.E. 876 (1907); *State v. Furrage*, 250 N.C. 616, 109 S.E.2d 563 (1959).

The rules prescribed by the Supreme Court to regulate its own procedure, including the rule as to dismissing an appeal thereto if not docketed, or a recordari prayed for in apt time, will be strictly enforced. Being under the exclusive authority therein given to the Supreme Court by this section, a statute in conflict therewith will not be observed. *State v. Ward*, 184 N.C. 618, 113 S.E. 775 (1922).

See Art. IV, § 11.

Judicial Power as Aid to Legislative Act.

—The judicial power cannot be exercised in aid of an unfinished and inoperative act, so left upon the final adjournment, any more than in obstructing legislative action. *State ex rel. Scarborough v. Robinson*, 81 N.C. 409 (1879).

Warrants.—The issuance of a warrant, whether considered a judicial act, a quasi-judicial act, a judicial function, or a ministerial act, does not require or involve the exercise of supreme judicial power within the meaning of this section. *State v. Furrage*, 250 N.C. 616, 109 S.E.2d 563 (1959).

A solicitor has no authority to administer an oath or to issue a warrant, absent authorization by the General Assembly. *State v. Furrage*, 250 N.C. 616, 109 S.E.2d 563 (1959).

Public-local law authorizing solicitor of recorder's court to issue warrants is not violative of this section. *State v. Furrage*, 250 N.C. 616, 109 S.E.2d 563 (1959).

Power of County to Apply Formula for Ascertaining Taxable Property.—Plaintiff county ascertained the amount of personal property of defendant nonresident corporation having a "business situs" in this State, and liable for taxation as solvent credits by the county by ascertaining the total assets of the defendant and the percentage of such assets found in the county, and allowing the same percent of its total liabilities to be deducted therefrom. Defendant complained that defendant county had made its own rule in ascertaining the solvent credits in the county subject to taxation in violation of this section, but since defendant failed to list its solvent credits for taxation as required by law, it was not prejudiced by the assessment of its personal property for taxation as de-

termined by the county. *County of Mecklenburg v. Sterchi Bros. Stores*, 210 N.C. 79, 185 S.E. 454 (1936).

The creation by the legislature of a board or municipal corporation and the conferring upon such board or municipal corporation quasi-judicial and administrative functions does not violate this section. *Cox v. City of Kinston*, 217 N.C. 391, 8 S.E.2d 252 (1940).

Delegation of Legislative Power to Administrative Agency.—As to some specific subject matter, the legislature may delegate a limited portion of its legislative power to an administrative agency if it prescribes the standards under which the agency is to exercise the delegated powers. *State Educ. Assistance Authority v. Bank of Statesville*, 276 N.C. 576, 174 S.E.2d 551 (1970).

The creation of the Mattamuskeet Drainage District by the legislature is not violative of the Constitution. *O'Neal v. Mann*, 193 N.C. 153, 136 S.E. 379 (1927).

North Carolina Turnpike Authority Act, former G.S. §§ 136-89.59 to 136-89.77, did not violate this section. *North Carolina Turnpike Authority v. Pine Island, Inc.*, 265 N.C. 109, 143 S.E.2d 319 (1965).

Statute authorizing the Industrial Commission to award compensation for bodily disfigurement is not unconstitutional as a void delegation of legislative power in contravention of this section. *Baxter v. W.H. Arthur Co.*, 216 N.C. 276, 4 S.E.2d 621 (1939).

Chapter 1177, Session Laws of 1967, which authorizes the State Education Assistance Authority to issue revenue bonds and to use the proceeds therefrom for the making of loans to "residents of this State to enable them to obtain an education in an eligible institution," as set forth in G.S. § 116-209.2, when supplemented by federal legislation, provides sufficient legislative standards whereby the Authority can determine to which students the loans should be made, since it is implicit in chapter 1177 that all loans made from the bond proceeds shall be made in compliance with the standards of federal legislation which supplement the loan program of the Authority. *State Educ. Assistance Authority v. Bank of Statesville*, 276 N.C. 576, 174 S.E.2d 551 (1970).

Sec. 7. Suspending laws. All power of suspending laws or the execution of laws by any authority, without the consent of the representatives of the people, is injurious to their rights and shall not be exercised.

Editor's Note.—The provisions of this section are similar to those of Art. I, § 9, Const. 1868.

Sec. 8. *Representation and taxation.* The people of this State shall not be taxed or made subject to the payment of any impost or duty without the consent of themselves or their representatives in the General Assembly, freely given.

Editor's Note.—The provisions of this section are similar to those of Art. I, § 23, Const. 1868.

Sec. 9. *Frequent elections.* For redress of grievances and for amending and strengthening the laws, elections shall be often held.

Editor's Note.—The provisions of this section are similar to those of Art. I, § 28, Const. 1868.

Sec. 10. *Free elections.* All elections shall be free.

Editor's Note.—The provisions of this section are similar to those of Art. I, § 10, Const. 1868, and the case cited in the following annotation was decided under that section.

Elector May Not Be Required to Take Oath Violating Section.—Membership in

a party and a right to participate in its primary may not be denied an elector because he refuses to take an oath to vote in a manner which violates this constitutional provision. *Clark v. Meyland*, 261 N.C. 140, 134 S.E.2d 168 (1964).

Sec. 11. *Property qualifications.* As political rights and privileges are not dependent upon or modified by property, no property qualification shall affect the right to vote or hold office.

Editor's Note.—The provisions of this section are similar to those of Art. I, § 22, Const. 1868.

Sec. 12. *Right of assembly and petition.* The people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances; but secret political societies are dangerous to the liberties of a free people and shall not be tolerated.

Editor's Note.—The provisions of this section are similar to those of Art. I, § 25, Const. 1868, as amended by the Convention of 1875.

Default Judgment Restraining Pastor from Appearing at Church. — See same catchline under § 1 of this article.

Sec. 13. *Religious liberty.* All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience.

Editor's Note.—The provisions of this section are similar to those of Art. I, § 26, Const. 1868, as amended in 1946, and the cases in the following annotation were decided under that section.

For case law survey as to freedom of religion, see 45 N.C.L. Rev. 862 (1967).

This Section Protects Freedom to Exercise One's Religion. — The term "rights of conscience" as used in this section, must be construed in relation to the right to worship God according to the dictates of one's own conscience. Consequently, the freedom protected by this provision of the State Constitution is no more extensive than the freedom to exercise one's religion, which is protected by the First Amendment to the Constitution of the United States. In *re Williams*, 269 N.C. 68, 152 S.E.2d 317 (1967).

But It Does Not Protect One's Sense of Ethics.—These constitutional provisions do not provide immunity for every act which one's conscience permits him to do, or even for every act which one's conscience classifies as required by ethics, nor do they shield the defendant from a command by the State that he do an act merely because he believes it morally or ethically wrong. It is the right to exercise one's religion, or lack of it, which is protected, not one's sense of ethics. In *re Williams*, 269 N.C. 68, 152 S.E.2d 317 (1967).

Protection Not Limited to Clergymen and Organized Religious Groups. — The freedoms protected by these constitutional provisions are not limited to clergymen. Indeed, they are not limited to members of an organized religious body and, consequently, are not contingent upon proof

that others share the views of the individual who asserts his own constitutional right to the freedom to exercise his religion or "right of conscience." In *re Williams*, 269 N.C. 68, 152 S.E.2d 317 (1967).

Unorthodox Religious Beliefs Are Protected.—The constitutional provisions extend their protection to the unorthodox, unusual and unreasonable belief as truly as to the belief shared by many. In *re Williams*, 269 N.C. 68, 152 S.E.2d 317 (1967).

But freedom to exercise one's religious beliefs is not absolute. In *re Williams*, 269 N.C. 68, 152 S.E.2d 317 (1967).

And use of drugs may be prohibited notwithstanding the user's asserted belief that such use is required by Divine Law. In *re Williams*, 269 N.C. 68, 152 S.E.2d 317 (1967), citing *State v. Bullard*, 267 N.C. 599, 148 S.E.2d 565 (1966).

Religious Freedom Is Impaired by Governmental Compulsion of That Which Religious Belief Forbids.—The free exercise of religion is impaired not only by governmental prohibition of that which one's religious belief demands but also by governmental compulsion of that which one's religious belief forbids. In *re Williams*, 269 N.C. 68, 152 S.E.2d 317 (1967).

And Government May Not Force One to Act Contrary to Religious Belief in Absence of "Compelling State Interest".—The liberty secured by the First Amendment to the United States Constitution and by this section is so basic and fundamental that one may not be compelled by governmental action to do that which is contrary to his religious belief in the absence of a "compelling State interest in the regulation of a subject within the State's constitutional power to regulate." In *re Williams*, 269 N.C. 68, 152 S.E.2d 317 (1967).

Effective operation of courts of justice is a "compelling State interest." In *re Williams*, 269 N.C. 68, 152 S.E.2d 317 (1967).

And It Overrides Belief of Witness Who Refuses to Testify for Religious Reasons.—The "compelling interest" of the State in the rendering of a just judgment in accordance with its law overrides the incidental infringement upon the religious belief of a witness that for him to testify is wrong. In *re Williams*, 269 N.C. 68, 152 S.E.2d 317 (1967).

The State has a compelling interest that a person called as a witness should be sworn and should testify in the administration of justice between the State and one charged with a serious offense, and therefore a minister called as a witness in such prosecution may be held in contempt of court upon his refusal to be sworn as a witness, notwithstanding he asserts that

his refusal is a matter of religious conscience. In *re Williams*, 269 N.C. 68, 152 S.E.2d 317 (1967).

The legal tribunals of the State have no jurisdiction over purely ecclesiastical questions and controversies, for there is a constitutional guarantee of freedom of religious profession and worship, as well as an equally firmly established separation of church and State, but the courts do have jurisdiction, as to civil, contract and property rights which are involved in, or arise from, a church controversy. *Reid v. Johnston*, 241 N.C. 201, 85 S.E.2d 114 (1954).

A law requiring the observance of Sunday as a day of rest and relaxation does not cease to be a reasonable exercise of the police power of the State, merely because it is in harmony with the religious beliefs of most Christian denominations. *Raleigh Mobile Home Sales, Inc. v. Tomlinson*, 276 N.C. 661, 174 S.E.2d 542 (1970).

The choice of the day of the week to be observed as a day of rest and relaxation is for the legislature. Obviously, it cannot choose a day which accords with the wishes and religious convictions of all of the people. In making its choice, the legislature may take into account the fact that Sunday is the day of the week which a great proportion of the people would observe as a day of rest apart from the statute, whether this be due to the religious conviction of such persons or to their traditions and customs. The choice of Sunday by the legislature does not render the statute unconstitutional, as a law establishing a religion or interfering with freedom of worship, merely because other persons are required by their religious convictions to rest from their labors on a different day of the week, or, having no religious convictions, consider Sunday as an exceptionally promising day for business. *Raleigh Mobile Home Sales, Inc. v. Tomlinson*, 276 N.C. 661, 174 S.E.2d 542 (1970).

The provisions of this section do not deprive the legislature of authority to prohibit by a statute, otherwise valid, the carrying on of and engaging in, on Sunday, any and all labor and the operation of industrial and commercial pursuits, except for works of necessity and acts which, themselves, are in exercise of the constitutional right to worship. The legislature may delegate this power to municipalities. *Raleigh Mobile Home Sales, Inc. v. Tomlinson*, 276 N.C. 661, 174 S.E.2d 542 (1970).

An ordinance prohibiting certain activities on Sunday, pursuant to G.S. § 160-200, (6) and (7), was not in contravention of this section. *State v. McGee*, 237 N.C. 633, 75 S.E.2d 783 (1953).

A municipal ordinance prohibiting the handling of venomous and poisonous reptiles in such a manner as to endanger the public health, safety and welfare, will not be held invalid upon defendants' contention that the ordinance interferes with the exer-

cise of their religious practices. *State v. Massey*, 229 N.C. 734, 51 S.E.2d 179 (1949).

Default Judgment Restraining Pastor from Appearing at Church. — See same catchline under § 1 of this article.

Sec. 14. *Freedom of speech and press.* Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse.

Editor's Note.—The provisions of this section are similar to those of Art. I, § 20, Const. 1868, and the cases in the following annotation were decided under that section.

Editorial Comment. — Editor of a city paper who commented in a sarcastic manner concerning action of city council "with the verbal backing of the mayor" in voting for purchase of a lot by the city at \$30 a foot did not abuse privilege granted by this section. *Yancey v. Gillespie*, 242 N.C. 227, 87 S.E.2d 210 (1955).

Contract Prohibiting Entering into Business.—A contract upon the sale of a news-

paper that the seller shall not for a period of ten years be connected with any newspaper in the State without obtaining the consent of the purchaser is not void under this section. *Cowan v. Fairbrother*, 118 N.C. 406, 24 S.E. 212 (1896).

This decision is placed on the ground that the framers of the Constitution did not intend to restrict the power of any person to dispose of anything of value which, as the creature of his own mental or physical exertions, has become his property. — Ed. note.

Sec. 15. *Education.* The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.

Editor's Note.—The provisions of this section are similar to those of Art. I, § 27, Const. 1868.

Sec. 16. *Ex post facto laws.* Retrospective laws, punishing acts committed before the existence of such laws and by them only declared criminal, are oppressive, unjust, and incompatible with liberty, and therefore no ex post facto law shall be enacted. No law taxing retrospectively sales, purchases, or other acts previously done shall be enacted.

Cross reference. — See note to G.S. § 49-2.

Editor's Note.—The provisions of this section are similar to those of Art. I, § 32, Const. 1868, and the cases in the following annotation were decided under that section.

Definition.—An ex post facto law is one which either makes that a crime which was not a crime when the offense was committed or which imposes a heavier sentence than that which was prescribed by law at that time. *State v. Broadway*, 157 N.C. 598, 72 S.E. 987 (1911). But a retrospective statute is not necessarily void. *Tabor v. Ward*, 83 N.C. 291 (1880).

The general rule, subject, however, to some exceptions, is that the legislature may validate retrospectively any proceeding which might have been authorized in advance, even though its act may operate to divest a right of action existing in favor of an individual, or subject him to a loss he would otherwise not have incurred. *Anderson v. Wilkins*, 142 N.C. 154, 55 S.E. 272 (1906).

Applies Only to Criminal Statutes.—An ex post facto statute prohibited by this section relates only to criminal statutes, and though vested rights may not be affected by retroactive laws, contingent interests may be affected thereby, and where there is a voluntary trust estate with the limitation over upon a contingent determinable at some future time as to the persons who take thereunder, the power of revocation of the trust given by G.S. § 39-6, is not objectionable as falling within the constitutional inhibition. *Stanback v. Citizens Nat'l Bank*, 197 N.C. 292, 148 S.E. 313 (1929).

Whenever a retrospective statute applies to crimes and penalties, it is an ex post facto law. *State v. Bond*, 49 N.C. 9 (1856); *State v. Bell*, 61 N.C. 76 (1867).

Miscellaneous Cases.—Validation of proceedings for the improvement of streets and sidewalks which were begun and which have been concluded without an initial petition, is proper and such act cannot be successfully attacked because it is retroactive or retrospective. *Holton v. Town of Mocksville*, 189 N.C. 144, 126 S.E. 326

(1925); *Unemployment Compensation Comm'n v. Wachovia Bank & Trust Co.*, 215 N.C. 491, 2 S.E.2d 592 (1939). As to prosecution for wilful failure to support illegitimate child born after the passage of the statute although the child was begotten before the effective date of the statute, see *State v. Mansfield*, 207 N.C. 233, 176 S.E. 761 (1934).

Sec. 17. *Slavery and involuntary servitude.* Slavery is forever prohibited. Involuntary servitude, except as a punishment for crime whereof the parties have been adjudged guilty, is forever prohibited.

Editor's Note. — The provisions of this section are similar to those of Art. I, § 33, Const. 1868.

Sec. 18. *Courts shall be open.* All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.

Editor's Note. — The provisions of this section are similar to those of Art. I, § 35, Const. 1868, and the cases in the following annotation were decided under that section.

For comment on unborn child being a person within the meaning of this section, see 28 N.C.L. Rev. 245.

Scope and Effect.—See *Pentuff v. Park*, 194 N.C. 146, 138 S.E. 616, 53 A.L.R. 626 (1927), quoting *Osborn v. Leach*, 135 N.C. 628, 47 S.E. 811, 66 L.R.A. 648 (1904).

The salutary principle set forth in this section does not justify the use of the courts, by the assertion of fanciful rights or by complaints based upon imaginary wrongs to hinder or delay others in the enjoyment of rights founded upon the law and in accord with justice and fair dealing among men. *Carson v. Fleming*, 188 N.C. 600, 125 S.E. 259 (1924).

In a court proceeding all parties are entitled to be present at all of its stages so that they may hear the evidence and have an opportunity to refute it if they can. *Raper v. Berrier*, 246 N.C. 193, 97 S.E.2d 782 (1957); *Cook v. Cook*, 5 N.C. App. 652, 169 S.E.2d 29 (1969).

Without doubt the court may question a child in open court in a custody proceeding but it can do so privately only by consent of the parties. *Cook v. Cook*, 5 N.C. App. 652, 169 S.E.2d 29 (1969).

In a proceeding for the custody of a minor child, where the judge conferred with the minor in chambers in the absence of counsel and the parties, the judgment must be reversed and the cause sent back for rehearing upon objection duly entered by petitioner, the record failing to show consent or waiver of his constitutional right by petitioner. *Raper v. Berrier*, 246 N.C. 193, 97 S.E.2d 782 (1957).

Unemployment Compensation Taxes. — Taxes levied for the year 1936 under the Unemployment Compensation Act, G.S. § 96-1 et seq., are void as violating this section. *Unemployment Compensation Comm'n v. Wachovia Bank & Trust Co.*, 215 N.C. 491, 2 S.E.2d 592 (1939).

In every criminal prosecution it is the right of the accused to be present throughout the trial, unless he waives the right. And in capital trials the rights cannot be waived by the prisoner. *State v. Pope*, 257 N.C. 326, 126 S.E.2d 126 (1962), commented on in 41 N.C.L. Rev. 260 (1963).

Delay Caused by Irregular Pleading. — Under the provisions of this section an adversary party ought not to be delayed in the final adjudication of the controversy by the fact that the exceptions taken by the opposite party are so drawn as to take two chances, first of a favorable decision by the court, and then of a finding in his favor by the jury. Nor ought he to be delayed because the demand for a jury trial fails to point out the precise issue as to which testimony must be offered. *Keystone Driller Co. v. Worth*, 118 N.C. 746, 24 S.E. 517 (1896). So also, the rights of the appellee will be protected when the appellant failed to print the record as required, and motion to reinstate the case, after dismissal, came too late. *Cowan v. Layburn*, 116 N.C. 526, 20 S.E. 965 (1895).

Disregarding Attempted Appeal from Nonappealable Order. — In order to promote the principle set forth in this section, courts may disregard an attempted appeal from a nonappealable interlocutory order and proceed with trial to avoid delay. *Veazey v. City of Durham*, 231 N.C. 357, 57 S.E.2d 377 (1950).

The denial of a motion for judgment on the pleadings is not immediately appealable, since otherwise a litigant could delay the administration of justice in contravention of this section. *Garrett v. Rose*, 236 N.C. 299, 72 S.E.2d 843 (1952).

A motion for a continuance is addressed to the discretion of the trial judge to be

determined by him upon the facts in the exercise of his duty to administer right and justice without sale, denial, or delay. *State v. Godwin*, 216 N.C. 49, 3 S.E.2d 347 (1939).

The creation of inferior courts by the legislature has been useful in having justice administered without "delay" in accordance with this section. *Albertson v. Albertson*, 207 N.C. 547, 178 S.E. 352 (1935).

Foreclosure of Mortgages.—This section is not violated by G.S. §§ 45-21.34 and 45-21.35 regulating the sale of real property upon the foreclosure of mortgages or deeds of trust. *Woltz v. Asheville Safe Deposit Co.*, 206 N.C. 239, 173 S.E. 587 (1934).

The establishment of a cartway involves the taking of private property by eminent domain, and land therefor may not be taken without giving the owner notice and an opportunity to be heard, with right of

appeal according to the due course of law. *Waldroup v. Ferguson*, 213 N.C. 198, 195 S.E. 615 (1938).

Section 45-21.36 of the General Statutes is constitutional and valid, since it recognizes the obligation of the debtor to pay his debt and the right of the creditor to enforce payment by action in accordance with the terms of the agreement, but provides merely for judicial supervision of sales under power to the end that the price bid at the sale shall not be conclusive as to the value of the property, and that the creditor may not recover any deficiency after applying the purchase price to the notes without first accounting for the fair value of the property in accordance with well-settled principles of equity. *Richmond Mtge. & Loan Corp. v. Wachovia Bank & Trust Co.*, 210 N.C. 29, 185 S.E. 482 (1936).

Sec. 19. *Law of the land; equal protection of the laws.* No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

I. General Consideration.

II. Rights of Defendants in Criminal Cases.

III. Taking of Private Property for Public Use.

IV. Matters Relating to Taxation.

V. Illustrative Cases.

I. GENERAL CONSIDERATION.

Cross Reference. — As to meaning of term "liberty," see § 1 of this article.

Editor's Note.—The provisions of this section are similar to those of Art. I, § 17, Const. 1868, and the cases in the following annotation were decided under that section.

For note on right of confrontation at presentence investigation, see 41 N.C.L. Rev. 260 (1963). For comment on the cul-de-sac doctrine, see 44 N.C.L. Rev. 850 (1966). For case law survey as to eminent domain, see 44 N.C.L. Rev. 941, 1003 (1966). For comment on the public purpose doctrine, see 3 Wake Forest Intra. L. Rev. 37 (1967). For case law survey as to due process and double jeopardy, see 45 N.C.L. Rev. 881 (1967). For case law survey as to right to notice and hearing, see 45 N.C.L. Rev. 883 (1967). For case law survey as to property rights, see 45 N.C.L. Rev. 887 (1967).

Under this section no person can be deprived of his property except by his own consent or the law of the land. *Eason v. Spence*, 232 N.C. 579, 61 S.E.2d 717 (1950).

What Constitutes "Law of the Land".—

It is said by Mr. Webster in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 4 L. Ed. 629 (1819): "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land." *State ex rel. Caldwell v. Wilson*, 121 N.C. 425, 28 S.E. 554 (1897); *Parish v. East Coast Cedar Co.*, 133 N.C. 478, 45 S.E. 768, 98 Am. St. R. 718 (1903); *State v. Collins*, 169 N.C. 323, 84 S.E. 1049 (1915).

The term "law of the land" means the general law, the law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. It means the regular course of the administration of justice through the courts of competent jurisdiction, after the manner of such courts. Procedure must be consistent with the fundamental principles of liberty and justice. *State v. Chesson*, 228 N.C. 259, 45 S.E.2d 563 (1947). See *Eason v. Spence*, 232 N.C. 579, 61 S.E.2d 717 (1950).

The "law of the land" is equivalent to "due process of law." *State v. Collins*, 169

N.C. 323, 84 S.E. 1049 (1915); *State v. Ballance*, 229 N.C. 764, 51 S.E.2d 731 (1949). See *National Sur. Corp. v. Sharpe*, 232 N.C. 98, 59 S.E.2d 593 (1950); *Eason v. Spence*, 232 N.C. 579, 61 S.E.2d 717 (1950); *Sale v. State Highway & Pub. Works Comm'n*, 242 N.C. 612, 89 S.E.2d 290 (1955); *State v. Perry*, 248 N.C. 334, 103 S.E.2d 404 (1958); *ET & WNC Transp. Co. v. Currie*, 248 N.C. 560, 104 S.E.2d 403 (1958); *State v. Parrish*, 254 N.C. 301, 118 S.E.2d 786 (1961); *State v. Hales*, 256 N.C. 27, 122 S.E.2d 768 (1961); *GI Surplus Store v. Hunter*, 257 N.C. 206, 125 S.E.2d 764 (1962); *Rice v. Rigsby*, 259 N.C. 506, 131 S.E.2d 469 (1963).

In *Hoke v. Henderson*, 15 N.C. 1 (1833), Chief Justice Ruffin said: "The clause itself means that such legislative acts as profess in themselves directly to punish persons, or to deprive the citizen of his property, without trial before the judicial tribunals, and a decision upon the matter of right, as determined by the laws under which it vested, according to the course, mode and usages of the common law as derived from our forefathers, are not effectually 'laws of the land' for those purposes." *State v. Cutshall*, 110 N.C. 538, 15 S.E. 261 (1892).

Restraints upon Police Power.—"Law of the land" under this section in relation to the exercise of the State police power, imposes flexible restraints which are satisfied if the act in question is not unreasonable, arbitrary or capricious and the means selected have a real and substantial relation to the objects sought to be attained. *State v. Whitaker*, 228 N.C. 352, 45 S.E.2d 860 (1947), *aff'd*, 335 U.S. 525, 69 S. Ct. 251, 93 L. Ed. 212 (1949).

Prohibitions Apply to All Three Branches of Government.—The constitutional prohibitions against the taking of private property without due process of law limit the powers of the executive and judicial branches as well as the legislative branch. In *re Trusteeship of Kenan*, 261 N.C. 1, 134 S.E.2d 85 (1964).

"Due process" has a dual significance, as it pertains to procedure and substantive law. *State v. Smith*, 265 N.C. 173, 143 S.E.2d 293 (1965).

In substantive law, due process may be characterized as a standard of reasonableness, and as such it is a limitation upon the exercise of the police power. *State v. Smith*, 265 N.C. 173, 143 S.E.2d 293 (1965).

The burden of establishing the unconstitutionality of a statute rests upon him who assails it, and courts may not declare a legislative discrimination invalid unless, viewed in the light of facts made known

or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators. *Raleigh Mobile Home Sales, Inc. v. Tomlinson*, 276 N.C. 661, 174 S.E.2d 542 (1970).

And reasonable doubt must be resolved in favor of constitutionality of an act of the General Assembly, and a statute will not be declared unconstitutional unless it is clearly so. *Vinson v. Chappell*, 3 N.C. App. 348, 164 S.E.2d 631 (1968).

The legislature may make classifications and distinctions in the application of laws provided they are reasonable and just and not arbitrary. *Motley v. State Bd. of Barber Exmrs.*, 228 N.C. 337, 45 S.E.2d 550, 175 A.L.R. 253 (1947).

Legislative bodies may make classifications for the application of regulations provided the classifications are practicable and apply equally to all persons within a class, since the constitutional mandate prescribing discrimination requires only that there be no inequality among those within a particular group or class. *State v. Trantham*, 230 N.C. 641, 55 S.E.2d 198 (1949).

These provisions of the Constitution are not so naive as not to contemplate the classifications and distinctions which orderly government is required to make with respect to the subjects of its control. "Discrimination" does not ordinarily connote unfairness nor can it be used as a label to disqualify and condemn a statute as "class legislation." It is only when the classification, or the distinction, is arbitrary and unjustifiable upon any reasonable view that it becomes invidious and offensive to the Constitution, so that the court may undertake to exercise the extraordinary power it possesses to declare the statute void. The unconstitutionality must clearly appear before the court can so declare it. *Vinson v. Chappell*, 3 N.C. App. 348, 164 S.E.2d 631 (1968); *Raleigh Mobile Home Sales, Inc. v. Tomlinson*, 276 N.C. 661, 174 S.E.2d 542 (1970).

Legislative bodies may distinguish, select, and classify objects of legislation. It suffices if the classification is practical. They may prescribe different regulations for different classes, and discrimination as between classes is not such as to invalidate the legislative enactment. *Raleigh Mobile Home Sales, Inc. v. Tomlinson*, 276 N.C. 661, 174 S.E.2d 542 (1970).

A state may classify in a statute with reference to the evil to be prevented, and if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be

feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one dependent upon experience. It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named. The State may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses. *Raleigh Mobile Home Sales, Inc. v. Tomlinson*, 276 N.C. 661, 174 S.E.2d 542 (1970).

The constitutional safeguards of this section are offended only if a classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power in passing a statute despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of fact reasonably may be conceived to justify it. *Raleigh Mobile Home Sales, Inc. v. Tomlinson*, 276 N.C. 661, 174 S.E.2d 542 (1970).

There is no constitutional requirement that a regulation, in other respects permissible, must reach every class to which it might be applied—that the legislature must be held rigidly to the choice of regulating all or none. It is enough that the statutes strike at the evil where it is felt and reaches the class of cases where it most frequently occurs. *Raleigh Mobile Home Sales, Inc. v. Tomlinson*, 276 N.C. 661, 174 S.E.2d 542 (1970).

A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. *Vinson v. Chappell*, 3 N.C. App. 348, 164 S.E.2d 631 (1968).

But legislation may not discriminate arbitrarily either as between persons, or groups of persons, or as between activities which are prohibited and those which are permitted. *Raleigh Mobile Home Sales, Inc. v. Tomlinson*, 276 N.C. 661, 174 S.E.2d 542 (1970).

Validity Depends upon Reasonable Relation to Accomplishment of Legitimate Objective.—The validity of a specific State statute or ordinance depends upon its reasonable relation to the accomplishment of the State's legitimate objective. *Raleigh Mobile Home Sales, Inc. v. Tomlinson*, 276 N.C. 661, 174 S.E.2d 542 (1970).

The validity of an exercise of the police power depends upon whether, under all the existing circumstances, it is reasonably calculated to accomplish a purpose falling within the legitimate scope of the power without burdening unduly the person or

corporation affected. *City of Raleigh v. Norfolk S. Ry.*, 4 N.C. App. 1, 165 S.E.2d 745 (1969).

In determining the validity of an exercise of the police power, changed conditions as they arise may bring the subject matter in question within the approved testing principle of reasonableness or may remove it therefrom. *Southern Ry. v. City of Winston-Salem*, 4 N.C. App. 11, 165 S.E.2d 751 (1969).

The reasonableness of an exercise of the police power is to be determined by the court, and is based on human judgment, natural justice, and common sense in view of all the facts and circumstances. *City of Raleigh v. Norfolk S. Ry.*, 4 N.C. App. 1, 165 S.E.2d 745 (1969).

While the standard of reasonableness by which exercise of the police power is tested does not change, changed conditions may bring the subject matter in question within the operation of approved testing principles of reasonableness or remove it therefrom. *City of Raleigh v. Norfolk S. Ry.*, 4 N.C. App. 1, 165 S.E.2d 745 (1969).

The effect of the exercise of the police power in particular situations may vary as social, economic and political conditions change, so that what was once a proper exercise of such power may later become arbitrary and unreasonable as a result of changed conditions and circumstances. *City of Raleigh v. Norfolk S. Ry.*, 4 N.C. App. 1, 165 S.E.2d 745 (1969).

When the exercise of the police power is challenged on constitutional grounds, the validity of the police regulation primarily depends on whether, under all the surrounding circumstances and particular facts of the case, the regulation is reasonably calculated to accomplish a purpose falling within the police power without burdening unduly the person or corporation affected. *Southern Ry. v. City of Winston-Salem*, 4 N.C. App. 11, 165 S.E.2d 751 (1969).

When Legislature May Grant Special Exemption from Duty Imposed on Citizens Generally.—The limitation of § 32 of this article, like that of this section, does not apply to an exemption from a duty imposed upon citizens generally if the purpose of the exemption is the promotion of the general welfare, as distinguished from the benefit of the individual, and if there is reasonable basis for the legislature to conclude that the granting of the exemption would be in the public interest. *State v. Knight*, 269 N.C. 100, 152 S.E.2d 179 (1967).

The General Assembly may not diminish a vested interest by artificially increasing the class in which the estate has vested.

Wachovia Bank & Trust Co. v. Andrews, 264 N.C. 531, 142 S.E.2d 182 (1965).

Vested Right in Dedicated Property. — Lots in a subdivision were sold with reference to a plat showing the street in question to be 99 feet in width. At the time the charter was granted to a municipality embracing the lands, the only plat recorded was a revised one showing the street as 80 feet wide. The granting of the charter cannot be construed as having the effect of limiting the width of the street to 80 feet so as to defeat the vested right of purchasers of lots with reference to the original plat to compel the owner to abide by its dedication of the street for the full width as shown by the plat. *Home Real Estate Loan & Ins., Co. v. Town of Carolina Beach*, 216 N.C. 778, 7 S.E.2d 13 (1940).

The action of the governing body of a town in abandoning and permitting part of a road in a subdivision to be closed for the private use and benefit of the defendant property owners in a subdivision was in violation of rights of other purchasers in the subdivision under this section and under the Fourteenth Amendment to the United States Constitution. *Town of Blowing Rock v. Gregorie*, 243 N.C. 364, 90 S.E.2d 898 (1956).

A contingent remainderman in lands acquires his interest therein subject to the payment of testator's debts, and in that respect can acquire no vested interest therein, and a sale thereof in good faith and at a fair price by the executrix, for the payment of decedent's debts, as authorized by statute, when by proper proceedings the land could have been sold for the purpose, though the executrix has mistaken therein the authority given her under the will, cannot be held as contrary to the provision of this section. *Charlotte Consol. Constr. Co. v. Brockenbrough*, 187 N.C. 65, 121 S.E. 7 (1924).

An Office as Vested Property.—Whether or not an officer appointed for a definite time to a legislative office has a vested property therein or contract right thereto has given rise to conflicting views and inharmonious decisions. In the early case of *Hoke v. Henderson*, 15 N.C. 1 (1833), it is held that an office is property and is the subject of protection like any other property under the provisions of this section of the Constitution. The reasoning used by the court in this case, which is to the effect that a public office exists by contracts between the State and the holder, has been the foundation for the decisions of the courts adhering to this view. See *Cotten v. Ellis*, 52 N.C. 545 (1860); *King v. Hunter*, 65 N.C. 603 (1871); *Bailey v. Caldwell*, 68

N.C. 472 (1873); *State ex rel. Bunting v. Gales*, 77 N.C. 283 (1877); *State ex rel. Walser v. Bellamy*, 120 N.C. 212, 27 S.E. 113 (1897). The general trend of American authority appears to have always maintained the opposite view. See *Butler v. Pennsylvania*, 51 U.S. (10 How.) 402, 13 L. Ed. 472 (1850); *Taylor v. Beckham*, 178 U.S. 548, 20 S. Ct. 890, 44 L. Ed. 1187 (1900), the North Carolina doctrine being criticized in many of the cases. However, North Carolina has now gotten away from the view to which it adhered over a long period of time and is now in line with the general current of American authority. *Hoke v. Henderson* being expressly overruled in *Mial v. Ellington*, 134 N.C. 131, 46 S.E. 961 (1903).

License of Attorney Protected. — This section constitutes the basis of the decision in those cases holding that an attorney who has been duly licensed to practice law cannot be disbarred or deprived of his license and right to practice, except upon conviction for a criminal offense, or after confession in open court. See *Ex parte Schenck*, 65 N.C. 353 (1871), and cases there cited.

Right to Pursue Occupation. — Historically and fundamentally the constitutional guaranties of individual liberty protect the individual in the selection and pursuit of the ordinary occupations against the unwarranted invocation of the police power. *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854, 128 A.L.R. 658 (1940).

Vested Liability.—Where legal liability has been created, the legislature cannot take it away without violating this section. *Lester Bros. v. Pope Realty & Ins. Co.*, 250 N.C. 565, 109 S.E.2d 263 (1959).

Legislature may limit time for assertion of property right provided it affords those vested with the right a reasonable time to assert same after the enactment of the statute, since there is no vested right in procedure. *Sheets v. Walsh*, 217 N.C. 32, 6 S.E.2d 817 (1940).

Revival of Barred Claims.—A State statute purporting to revive claim barred by statute of limitations violates due process clauses of State and federal Constitutions, whether such claim affects vested property right or arises under contract. *Valleytown Tp. v. Women's Catholic Order of Foresters*, 115 F.2d 459 (4th Cir.), rev'g 32 F. Supp. 894 (W.D.N.C. 1940).

Additional Liability Imposed by Amendment Act Must Be Prospective. — Acts 1925, c. 117, amending G.S. § 53-42 and imposing personal liability on stockholders, could not be given retroactive effect. *Bank of Pinchurst v. Derby*, 218 N.C. 653, 12 S.E.2d 260 (1940).

Freedom to contract is both a liberty and a property right within the protection of the due process clauses of the federal Constitution and this section of the State Constitution. See *Morris v. Holshouser*, 220 N.C. 293, 17 S.E.2d 115, 137 A.L.R. 733 (1941), discussing law pertaining to employee's right to assign future wages.

Freedom of contract, unless contrary to public policy or prohibited by statute, is a fundamental right included in our constitutional guaranties. *Muncie v. Travelers Ins. Co.*, 253 N.C. 74, 116 S.E.2d 474 (1960).

Obligation of Contract Not to Be Impaired.—The obligation of a contract, within the meaning of the constitutional prohibition against impairment, includes all the means and assurances available for the enforcement of the contract at the time of its execution. *Bateman v. Sterrett*, 201 N.C. 59, 159 S.E. 14 (1931).

Section prohibits enforcing any statute which would enable one person to evade or avoid the binding force of his contracts with another, whether executed or executory. *Booth v. Hairston*, 193 N.C. 278, 136 S.E. 879, 57 A.L.R. 1186 (1927), citing *Lowe v. Harris*, 112 N.C. 472, 17 S.E. 539, 22 L.R.A. 379 (1893).

The 1933 amendment to former G.S. § 1-512 was constitutional, since it did not impair the obligations of a contract under this section, the effect of the statute being merely to alter the method of procedure in which there can be no vested right. *Sovereign Camp, W.O.W. v. Board of Comm'rs*, 208 N.C. 433, 181 S.E. 339 (1935).

Protection against Discriminatory Actions of Officials.—The provisions of the "law of the land" clause of the Constitution of North Carolina and the Fourteenth Amendment to the Constitution of the United States afford protection against discriminatory actions of officials in administering the law. *State v. Wilson*, 262 N.C. 419, 137 S.E.2d 109 (1964).

Rights of Litigant in Judicial Proceeding.—The law of the land clause embodied in this section guarantees to the litigant in every kind of judicial proceeding the right to an adequate and fair hearing before he can be deprived of his claim or defense by judicial decree. And where the claim or defense turns upon a factual adjudication, the constitutional right of the litigant to an adequate and fair hearing requires that he be apprised of all the evidence received by the court and given an opportunity to test, explain, or rebut it. *In re Custody of Gupton*, 238 N.C. 303, 77 S.E.2d 716 (1953).

Trial Must Precede Judgment.—An order for the commitment of a person to an insane hospital is essentially a judgment by which he is deprived of his liberty, and it is a cardinal principle of English jurisprudence that before any judgment can be pronounced against a person there must have been a trial of the issue upon which the judgment is given. *In re Wilson*, 257 N.C. 593, 126 S.E.2d 489 (1962).

Notice and Opportunity to Be Heard Required.—The essential elements of the "law of the land" are notice and opportunity to be heard or defend, before a competent tribunal, in an orderly proceeding adapted to the nature of the case, which is uniform and regular, and in accord with established rules which do not violate fundamental rights. *Eason v. Spence*, 232 N.C. 579, 61 S.E.2d 717 (1950).

Under "the law of the land" clause of this section a judgment cannot bind a person unless he is brought before the court in some way sanctioned by law and afforded an opportunity to be heard in defense of his right. *Eason v. Spence*, 232 N.C. 579, 61 S.E.2d 717 (1950); *State ex rel. Bowman v. Malloy*, 264 N.C. 396, 141 S.E.2d 796 (1965).

Due process of law implies the right and opportunity to be heard and to prepare for hearing. *In re Wilson*, 257 N.C. 593, 126 S.E.2d 489 (1962).

As to procedure, due process means notice and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case before a competent and impartial tribunal having jurisdiction of the cause. *State v. Smith*, 265 N.C. 173, 143 S.E.2d 293 (1965).

Due process of law requires that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defense. *State v. Covington*, 258 N.C. 495, 128 S.E.2d 822 (1963).

The law of the land clause embodied in this section guarantees to the litigant in every kind of judicial proceeding the right to an adequate and fair hearing before he can be deprived of his claim or defense by judicial decree. *Shepherd v. Shepherd*, 273 N.C. 71, 159 S.E.2d 357 (1968).

"The law of the land" and "due process of law" provisions of the State and federal Constitutions require notice and an opportunity to be heard before a citizen may be deprived of his property. *McMillan v. Robeson County*, 262 N.C. 413, 137 S.E.2d 105 (1964); *City of Randleman v. Hinshaw*, 267 N.C. 136, 147 S.E.2d 902 (1966).

No valid judgment can be entered disposing of one's property unless he has been given notice of the action seeking to accom-

plish that purpose and has been afforded an opportunity to assert his defense. *Sutton v. Davenport*, 258 N.C. 27, 128 S.E.2d 16 (1962).

Where the claim or defense turns upon a factual adjudication, the constitutional right of the litigant to an adequate and fair hearing requires that he be apprised of all the evidence received by the court and given an opportunity to test, explain, or rebut it. *Shepherd v. Shepherd*, 273 N.C. 71, 159 S.E.2d 357 (1968).

Notice to a party whose rights are to be affected by judicial proceedings in a North Carolina court is an essential element of the law of the land under this section. The notice required by this constitutional provision in such proceedings is the notice inherent in the original process whereby the court acquires original jurisdiction, and not notice of the time when the jurisdiction vested in the court by the service of the original process will be exercised. *Collins v. North Carolina State Highway & Pub. Works Comm'n*, 237 N.C. 277, 74 S.E.2d 709 (1953).

To give G.S. § 1-108 an interpretation contrary to its express language, binding on one not named in an order of publication, would render it void as violative of this section. *Sutton v. Davenport*, 258 N.C. 27, 128 S.E.2d 16 (1962).

In *Farmer v. Ferris*, 260 N.C. 619, 133 S.E.2d 492 (1963), it was held that a foreign corporation selling amusement park devices had sufficient minimum contacts with North Carolina and that there had been a reasonable method of notification to it, so that suit in personam against it and maintenance of cross action in personam against it in North Carolina court were not inhibited by this section.

It is a principle never to be lost sight of, that no person should be deprived of his property or rights without notice and an opportunity of defending them. This right is guaranteed by the Constitution of North Carolina. Hence, it is that no court will give judgment against any person unless such person have an opportunity of showing cause against it. A judgment entered up otherwise would be a mere nullity. *City of Randleman v. Hinshaw*, 267 N.C. 136, 147 S.E.2d 902 (1966).

The due process clause is not violated by failure to give the owner of property an opportunity to be heard as to the necessity and extent of appropriating his property to public use; but it is essential to due process that the mode of determining the compensation to be paid for the appropriation be such as to afford the owner an opportunity to be heard. *City of Randleman v.*

Hinshaw, 269 N.C. 136, 147 S.E.2d 902 (1966).

An adjudication affecting the marital status and finally determining personal and property obligations must be preceded by notice and an opportunity to be heard. *McLean v. McLean*, 233 N.C. 139, 63 S.E.2d 138 (1951).

The intent and purpose of the statutes in regard to service of summons is to give notice and an opportunity to be heard, and where service is had upon a statutory process agent who is not in fact an agent or officer of defendant corporation, the imputation of the negligence of such process agent to the corporation so as to preclude it from moving to set aside a default judgment against it for surprise and excusable neglect would be a denial of due process of law. *Townsend v. Carolina Coach Co.*, 231 N.C. 81, 56 S.E.2d 39 (1950).

Same—Hearing with Respect to Telephone Rate Increase.—The Utilities Commission must determine a petition for an increase in telephone rates on the basis of the facts existing at the time such increase is effective, and if a subsequent change in conditions warrants a new rate, such new rate must relate to the date of change and the parties must be accorded an opportunity to be heard with respect to the effect, if any, such change had on the rate structure, and a denial of such opportunity would be a deprivation of due process. *State ex rel. North Carolina Util. Comm'n v. Western Carolina Tel. Co.*, 260 N.C. 369, 132 S.E.2d 873 (1963).

Right of Appeal.—The question whether the right of appeal is essential to the "due process" clauses of the State or federal Constitutions is discussed in *Gunter v. Town of Sanford*, 186 N.C. 452, 120 S.E. 41 (1923).

Trespassers Not Protected.—The guarantee of this section against imprisonment except by the law of the land was not intended to protect trespassers from prosecution or to prohibit a private property owner from selecting his guests or customers. *State v. Fox*, 254 N.C. 97, 118 S.E.2d 58 (1961).

Discrimination by Owner of Private Property.—The enforcement of the right of the owner or possessor of private property to discriminate on the basis of race as to those he will permit to enter or remain on the premises does not violate any rights of the individual guaranteed under this section. *State v. Avent*, 253 N.C. 580, 118 S.E.2d 47 (1961).

Judicial Process Held Not Violative of Section.—The fact that the State provides a system of courts for the enforcement of

legal rights against trespassers upon private property in violation of G.S. §§ 14-126 and 14-134 and the acts of its judicial officers in their official capacities cannot fairly be said to be State action enforcing racial segregation in violation of the Fourteenth Amendment to the federal Constitution, and such judicial process violates no rights of the defendants guaranteed to them by this section. *State v. Avent*, 253 N.C. 580, 118 S.E.2d 47 (1961).

Prohibiting Certain Activities on Sunday.—The provisions of this section do not deprive the legislature of authority to prohibit by a statute, otherwise valid, the carrying on of and engaging in, on Sunday, any and all labor and the operation of industrial and commercial pursuits, except for works of necessity and acts which, themselves, are in exercise of the constitutional right to worship. The legislature may delegate this power to municipalities. *Raleigh Mobile Home Sales, Inc. v. Tomlinson*, 276 N.C. 661, 174 S.E.2d 542 (1970).

Neither the State nor the federal Constitution requires that a statute or ordinance, enacted for establishing Sunday as a day of rest be held invalid unless it prohibits every activity which could be brought within its scope. A general prohibition is not invalidated by excepting therefrom activities which may reasonably be thought to contribute to the rest, relaxation or other need of a segment of the public to a degree sufficient to outweigh the interference resulting therefrom to the rest and relaxation of the remainder. The weighing of such benefits and detriments is for the legislative body in the first instance. Its determination will not be disturbed by the courts unless clearly unreasonable. *Raleigh Mobile Home Sales, Inc. v. Tomlinson*, 276 N.C. 661, 174 S.E.2d 542 (1970).

The legislative body has a wide discretion in determining which activities do and which activities do not interfere with the observance of Sunday as a day of general rest and relaxation sufficiently to justify the prohibition of those activities on that day. The burden rests upon the person complaining to establish the absence of a reasonable basis for such determination. *Raleigh Mobile Home Sales, Inc. v. Tomlinson*, 276 N.C. 661, 174 S.E.2d 542 (1970).

The objective of a municipal ordinance being the establishment of Sunday as a day of general rest and relaxation, the difference in treatment by the ordinance of two types of business must be supported by a reasonable basis for the conclusion that one, substantially more than the other, will interfere with such use and enjoyment of the day. *Raleigh Mobile Home Sales,*

Inc. v. Tomlinson, 276 N.C. 661, 174 S.E.2d 542 (1970).

An ordinance prohibiting certain activities on Sunday, passed pursuant to G.S. § 160-200, (7) and (8), was not in contravention of this section. *State v. McGee*, 237 N.C. 633, 75 S.E.2d 783 (1953); *Charles Stores Co. v. Tucker*, 263 N.C. 710, 140 S.E.2d 370 (1965).

Ordinances prohibiting the exercise of all occupations generally on Sunday "except those of necessity and charity" are constitutional and exceptions are valid if they are reasonable and do not discriminate within a class between competitors similarly situated. *Charles Stores Co. v. Tucker*, 263 N.C. 710, 140 S.E.2d 370 (1965).

An ordinance passed pursuant to G.S. § 160-52 prohibiting generally the operation of all businesses within a municipality on Sunday, but excepting certain businesses, was held not to violate this section. *Clark's Charlotte, Inc. v. Hunter*, 261 N.C. 222, 134 S.E.2d 364 (1964).

A Sunday observance ordinance which classifies "sporting goods and toys" as prohibited items and live bait as permitted items cannot be considered unreasonable, arbitrary or discriminatory. *S.S. Kresge Co. v. Tomlinson*, 275 N.C. 1, 165 S.E.2d 236 (1969).

A municipal ordinance which prohibits the sale on Sunday of mobile homes but which does not prohibit the sale on Sunday of conventional homes is held valid, since a classification based on the differences between the two types of selling—presence or absence of traffic, congestion, and noise—bears a reasonable relation to the purpose of the ordinance in establishing Sunday as a day of rest and relaxation. *Raleigh Mobile Home Sales, Inc. v. Tomlinson*, 276 N.C. 661, 174 S.E.2d 542 (1970).

Requiring Sunday Closing of Night Clubs near Schools and Churches.—The classification of night clubs into (1) those "located within 300 yards of the property on which is located any public school or church building," and (2) all others, for the purpose of closing the former from 2:00 A.M. until 12:00 midnight on Sunday, is both unreasonable and discriminatory. *State v. Smith*, 265 N.C. 173, 143 S.E.2d 293 (1965).

School Authorities Must Act in Good Faith When Reemploying Teachers.—Those connected with school administration including the county boards of education and school principals, must act in good faith and not arbitrarily, capriciously or without just cause or be activated by selfish motives in deciding which teachers to reemploy for a school term. *Wall v. Stanly*

County Bd. of Educ., 259 F. Supp. 238 (M.D.N.C. 1966), rev'd on other grounds, 378 F.2d 275 (4th Cir. 1967.)

II. RIGHTS OF DEFENDANTS IN CRIMINAL CASES.

Cross Reference.—See also § 23 of this article and the note thereto.

Due process of law secures rights to a defendant. State v. Patton, 260 N.C. 359, 132 S.E.2d 891 (1963).

But it does not preclude the rights of public justice. State v. Patton, 260 N.C. 359, 132 S.E.2d 891 (1963).

The discretion of the trial judge given him over the trial of a cause is rarely interfered with, though his action may be set aside for such gross abuse as would invade the legal rights to the prejudice of the appealing party. State v. Sauls, 190 N.C. 810, 130 S.E. 848 (1925).

Judge Not Required to Aid in Presentation of Defense.—A trial judge is not required by either the federal or State Constitutions to aid a defendant on trial before him in the presentation of his defense. State v. Morris, 275 N.C. 50, 165 S.E.2d 245 (1969).

The fact that a justice's compensation is fixed upon a fee basis, which he will receive only in the event of conviction, does not result in depriving the defendant of trial under due process of law. In re Steele, 220 N.C. 685, 18 S.E.2d 132 (1942).

Waiver of Rights of Defendant in Criminal Case.—See State v. Bazemore, 193 N.C. 336, 137 S.E. 172 (1927).

Search and Seizure.—See State v. Fowler, 172 N.C. 905, 90 S.E. 408 (1916).

Right to Counsel.—See note to § 23 of this article, analysis line IV.

Exclusion of Negroes from Grand Jury.—The Supreme Court has held in a long and unbroken line of cases beginning with State v. Peoples, 131 N.C. 784, 42 S.E. 814 (1902), that arbitrary exclusion of citizens from service on grand juries on account of race is denial of due process to members of the excluded race charged with indictable offenses. State v. Lowry, 263 N.C. 536, 139 S.E.2d 870 (1965); State v. Yoes, 271 N.C. 616, 157 S.E.2d 386 (1967).

More than 60 years ago the Supreme Court of North Carolina stated clearly that § 24 of this article requires the sustaining of a motion to quash an indictment of a negro who proves that the members of his race have been systematically excluded from the juries of the county in which he has been indicted in State v. Peoples, 131 N.C. 784, 42 S.E. 814 (1902). Since that time it has never been doubted by the

courts of this State that the provisions of this section and § 24 of this article are to be so interpreted and that such systematic exclusion from the grand jury of persons, otherwise qualified, because of their race, requires, upon motion duly made, the quashing of an indictment returned against a member of that race by such grand jury irrespective of the fact that all members of the grand jury were, themselves, qualified jurors. State v. Knight, 269 N.C. 100, 152 S.E.2d 179 (1967).

The selection of jurors on the basis of race is forbidden. State v. Wright, 274 N.C. 380, 163 S.E.2d 897 (1968).

The indictment of a negro defendant by a grand jury in a state court from which members of his race have been systematically excluded solely because of their race is a denial of his right to the "law of the land," protected by this section. State v. Perry, 248 N.C. 334, 103 S.E.2d 404 (1958); State v. Covington, 258 N.C. 495, 128 S.E.2d 822 (1963); State v. Arnold, 258 N.C. 563, 129 S.E.2d 229 (1963).

The indictment of a negro defendant by a grand jury in a state court from which members of his race have been intentionally excluded solely because of their race is not good, for the reason that as to such negro defendant it is not a legal grand jury. State v. Covington, 258 N.C. 495, 128 S.E.2d 822 (1963).

An indictment of a defendant by a grand jury, from which persons of the defendant's race have been intentionally excluded solely because of their race, does not confer jurisdiction upon the superior court to try the defendant upon the charge named in the bill. State v. Wright, 274 N.C. 380, 163 S.E.2d 897 (1968).

The indictment of a negro defendant by a grand jury from which members of the defendant's race have been intentionally excluded on account of their race is not a valid indictment and confers upon the court no jurisdiction to determine the defendant's guilt or innocence of the offense charged in the indictment. State v. Yoes, 271 N.C. 616, 157 S.E.2d 386 (1967).

If there was intentional discrimination against members of the defendant's race in the compiling of the list of names from which was selected the names which went into the jury box, out of which came the names of the grand jury which indicted the defendant, the indictment is not saved by the purity of the processes used in transferring names from that jury list into the jury box or in drawing names from the jury box. State v. Wright, 274 N.C. 380, 163 S.E.2d 897 (1968).

In the United States and in the State of

North Carolina a conviction of a negro cannot stand if it is based on an indictment of a grand jury or the verdict of a petit jury from which negroes were excluded by reason of their race. *State v. Ray*, 274 N.C. 556, 164 S.E.2d 457 (1968).

One who is indicted for a criminal offense must have a fair opportunity to have it determined by adequate and timely procedure whether members of his race, legally qualified to serve as jurors, have been intentionally excluded, on account of their race or color, from the grand jury returning the indictment. *State v. Wright*, 274 N.C. 380, 163 S.E.2d 897 (1968).

A trial court commits reversible error in refusing to grant defendant sufficient time to offer evidence in support of his motion to quash indictment on the ground that members of his race, by reason of their race, were systematically excluded from serving on the grand jury that returned the indictments as true bills. *State v. Inman*, 260 N.C. 311, 132 S.E.2d 613 (1963).

Whether the defendant can establish alleged racial discrimination or not in the drawing and selection of the grand jury, due process of law demands that he have his day in court on this matter, and such day he does not have, unless he has a reasonable opportunity and time to investigate and produce his evidence, if he has any. *State v. Covington*, 258 N.C. 495, 128 S.E.2d 822 (1963); *State v. Inman*, 260 N.C. 311, 132 S.E.2d 613 (1963).

Whether a defendant has been given by the court a reasonable time and opportunity to investigate and produce evidence, if he can, of racial discrimination in the drawing and selection of a grand jury panel must be determined from the facts in each particular case. *State v. Covington*, 258 N.C. 495, 128 S.E.2d 822 (1963).

The burden is upon the defendant to establish the racial discrimination alleged in his motion to quash the indictment. However, once a prima facie case is made out the burden shifts to the prosecution. *State v. Ray*, 274 N.C. 556, 164 S.E.2d 457 (1968).

The burden of proving discriminatory jury practices is upon defendant, but this does not relieve the prosecuting attorney of the duty of going forward with the evidence when the defendant has made out a prima facie case. *State v. Wilson*, 262 N.C. 419, 137 S.E.2d 109 (1964).

The test is not whether a negro did or did not serve on the grand jury in question, nor is it whether there has been discrimination in the selection of other grand juries in the past. The determinative question is whether, in the selection of the

grand jury which returned the indictment under attack, there was or was not systematic and arbitrary exclusion of qualified negroes either in the composition of the jury box from which the grand jury was drawn or in the drawing therefrom of the grand jury in question. *State v. Yoes*, 271 N.C. 616, 157 S.E.2d 386 (1967).

A negro moving to quash a bill of indictment on the ground that the grand jury which returned it was unlawful because of discrimination against negroes in its selection, must prove affirmatively that qualified negroes were intentionally excluded from the grand jury because of their race. This, however, may be shown by circumstantial evidence. Neither a showing that, over a substantial period, in a county with a relatively large negro population only a few negroes had served on juries, nor a showing that the race of the persons whose names appeared on scrolls in the jury box was designated on such scrolls, is conclusive proof of arbitrary and systematic exclusion of negroes from the grand jury which indicted the defendant. A showing of these circumstances does, however, constitute a prima facie showing of the discrimination forbidden by the law of this State. Such prima facie showing casts upon the State the burden to go forward with evidence sufficient to overcome it. *State v. Yoes*, 271 N.C. 616, 157 S.E.2d 386 (1967).

It is not enough for the defendant to show that the names which went into the jury box were taken originally from a source which disclosed the race of the persons named in such source material. Where, however, the defendant also shows that, throughout a substantial period of years, in which essentially the same procedures were used in compiling jury lists, there was repeatedly a marked discrepancy between the number of negroes drawn for grand jury service and the number of negroes whose names appeared on the source material, such circumstances, in their totality, make out a prima facie case of unconstitutional discrimination in the selection of the grand jury which indicted the defendant. Upon such showing by the defendant, the burden rests upon the State to go forward with competent evidence to rebut the prima facie case, by explanation of the discrepancy or by other evidence showing no intentional and designed discrimination against the members of the defendant's race at any part of the processes culminating in the selection of the grand jury by which he was indicted. Of course, a mere denial of the wrongful intent does not suffice to rebut such prima facie showing of the forbidden discrimination. *State v.*

Wright, 274 N.C. 380, 163 S.E.2d 897 (1968).

When, at a hearing upon a motion to quash the bill of indictment, there is a showing that a substantial percentage of the population of the county from which the grand jury that returned the bill was drawn is of the negro race and that no negroes, or only a token number, have served on the grand juries of the county over a long period of time, such showing makes out a prima facie case of systematic exclusion of negroes from service on the grand jury because of race. *State v. Wilson*, 262 N.C. 419, 137 S.E.2d 109 (1964).

Just as a showing that no negro served on the particular grand jury which returned the bill of indictment does not make the bill of indictment invalid, so a showing that a negro did serve on the particular grand jury, or that a token number of negroes had served on other grand juries, is not necessarily sufficient to rebut a prima facie case of unlawful discrimination. *State v. Yoes*, 271 N.C. 616, 157 S.E.2d 386 (1967).

To overcome a prima facie case of systematic discrimination because of race, there must be a showing by competent evidence that the institution and management of the jury system of the county is not in fact discriminatory. And if there is contradictory and conflicting evidence, the trial judge must make findings as to all material facts. *State v. Wilson*, 262 N.C. 419, 137 S.E.2d 109 (1964).

The evidence disclosed that the names of negroes were printed in red and the names of white persons were printed in black in preparing names for the jury box, and that in drawing the names from the box the names of negroes were without exception rejected. It was held that the motion of defendant, a negro, to quash the indictment found by a grand jury so selected, should have been allowed, since such systematic and arbitrary exclusion of negroes from the grand jury deprived him of his constitutional rights. *State v. Speller*, 229 N.C. 67, 47 S.E.2d 537 (1948).

The record contained abundant evidence to support the finding by the trial judge that, in the selection of the grand jury which indicted defendants, there was no arbitrary or systematic exclusion of members of the negro race. *State v. Yoes*, 271 N.C. 616, 157 S.E.2d 386 (1967).

The evidence was sufficient to support a finding that there was no racial discrimination in the selection of the grand jury. *State v. Perry*, 250 N.C. 119, 108 S.E.2d 447 (1959).

See also § 26 of this article.

The practice of designating the race of prospective jurors upon the scrolls in the jury box, either by the words "colored" or its abbreviation, or by the use of different colored scrolls for the names of white and negro prospective jurors, has been expressly disapproved by the Supreme Court. Proof that the scrolls in the jury box carried such racial designation does not, however, compel the conclusion that all indictments returned by a grand jury drawn from such jury box are invalid. *State v. Yoes*, 271 N.C. 616, 157 S.E.2d 386 (1967).

Any intimation of racial discrimination arising from the fact that the scrolls in the jury box carry a symbol designating race is not conclusive of racial discrimination in the selection of grand jurors therefrom, and such intimation is rebutted when the record contains uncontradicted evidence that the name of every person listing property or poll for taxation in the county went into the jury box, except those purged for lack of moral character or mental incapacity, and there is no evidence that any name placed in the box was withdrawn therefrom after it was placed therein, and there is uncontradicted testimony that no name drawn from the jury box for the panel was laid aside for any reason whatsoever, and there is further uncontradicted evidence that no member of the board of commissioners was aware of the significance of the code designation of race and that the grand jury was drawn from the jury box in their presence by a child under the age of ten years. *State v. Yoes*, 271 N.C. 616, 157 S.E.2d 386 (1967).

Where a prima facie showing of discrimination has been made, as by a showing that the scrolls in the jury box contained racial designation and that for a substantial period in the past relatively few negroes have served on the juries of the county notwithstanding a substantial negro population therein, the prima facie case is not rebutted by the mere denial by the officials, charged with the duty of administering the selective process, that there was any intentional, arbitrary or systematic discrimination on account of race in the selection of the grand jury. To overcome such prima facie case, there must be a showing by competent evidence that the institution and management of the jury system of the county is not in fact discriminatory. *State v. Yoes*, 271 N.C. 616, 157 S.E.2d 386 (1967).

Representation on juries in proportion to racial population is not required. *State v. Wilson*, 262 N.C. 419, 137 S.E.2d 109 (1964).

It is not required that the negro race be represented on a jury panel in the same ratio to the total membership as the negro population of the county bears to the total population. *State v. Yoes*, 271 N.C. 616, 157 S.E.2d 386 (1967).

A defendant is not entitled to have the charge against him considered by a grand jury composed entirely of members of his own race, or even by a grand jury containing any member of his race. It follows that, for an indictment to be valid, it need not have been returned by a grand jury composed of members of the white and negro races in proportion to the representation of these races in the population of the county, or upon the tax books or other source from which the names upon the jury list were taken. That which is forbidden by the State and federal Constitutions is the elimination of members of the defendant's race from, or a limitation upon the representation of his race on, the grand jury, which considers the charge against him, by intent and design on account of race. The burden rests upon the defendant to prove that there was such discrimination against the members of his race in the process by which the grand jury, which indicted him, was selected. *State v. Wright*, 274 N.C. 380, 163 S.E.2d 897 (1968).

But Indictment and Trial Must Be by Juries Selected without Discrimination.—A citizen has no right to insist that he be indicted or tried by juries composed of persons of his race, nor to have a person of his race on the juries which indict and try him. But he has the right to be indicted and tried by juries from which persons of his race have not been systematically excluded—juries selected from all qualified persons regardless of race. *State v. Wilson*, 262 N.C. 419, 137 S.E.2d 109 (1964).

It is not the right of any party to be tried or indicted by a jury of his own race, or to have a representative of any particular race on the jury. It is his right to be tried by a competent jury from which members of his race have not been unlawfully excluded. *State v. Yoes*, 271 N.C. 616, 157 S.E.2d 386 (1967).

When Exclusion of Class of Persons from Jury Service Will Not Invalidate Indictment.—Even the complete exclusion, by State law, of a group or class of persons from eligibility for jury service will not make invalid an indictment by a grand jury, selected in accordance with such State law, so long as there is no reasonable basis for the conclusion that the ineligible group or class would bring to the deliberations of the jury a point of view not otherwise repre-

sented upon it, at least where the defendant is not a member of the excluded group. *State v. Knight*, 269 N.C. 100, 152 S.E.2d 179 (1967).

A jury list is not discriminatory merely because it is made from the tax list. However, it is better practice to supplement such list by resorting to voter registrations and other available lists. *State v. Ray*, 274 N.C. 556, 164 S.E.2d 457 (1968).

A jury list is not discriminatory, and a grand jury drawn therefrom is not unlawful, merely because it is made from the tax list of the county. *State v. Yoes*, 271 N.C. 616, 157 S.E.2d 386 (1967).

The use of tax lists as a source of names to be placed upon the jury list, and then to be put into the jury box, does not render illegal a grand jury drawn from the box, even though the tax lists separated negro and white taxpayers or otherwise designated their respective races. *State v. Wright*, 274 N.C. 380, 163 S.E.2d 897 (1968).

Exclusion of Women from Grand Jury.—The male defendant moved to quash the bill of indictment on the ground that it was returned by a grand jury composed entirely of men and that women had been unlawfully excluded therefrom. It was held that there had been no discrimination against the class or sex to which defendant belongs, and he could not have been prejudiced by the alleged discrimination, and therefore he may not raise the question of the qualification of women to serve as jurors or maintain that the proceeding constituted a violation of the equal protection guaranteed by the Fourteenth Amendment of the federal Constitution and by this section. *State v. Sims*, 213 N.C. 590, 197 S.E. 176 (1938).

Exemption from Jury Duty.—So far as the requirements of the due process clause of the Fourteenth Amendment to the United States Constitution are concerned, it is sufficient, in order to sustain a State statutory exemption from jury duty, that there is reasonable ground for the legislature to believe that the public interest and general welfare will be better served by the grant of the exemption than by subjecting the members of the exempted class to the duty imposed upon other members of the community. And it is so held with reference to the provisions of this section. *State v. Knight*, 269 N.C. 100, 152 S.E.2d 179 (1967).

Section Prohibits Double Jeopardy.—A person cannot be tried twice for the same offense under this section. *State v. Mansfield*, 207 N.C. 233, 176 S.E. 761 (1934); *State v. Crocker*, 239 N.C. 446, 80 S.E.2d

243 (1954); *State v. Birkhead*, 256 N.C. 494, 124 S.E.2d 838 (1962).

It is a fundamental and sacred principle of the common law, deeply imbedded in criminal jurisprudence, that no person can be twice put in jeopardy of life or limb for the same offense. While the principle is not stated in express terms in the North Carolina Constitution, it is regarded as an integral part of the "law of the land" within the meaning of this section. *State v. Crocker*, 239 N.C. 446, 80 S.E.2d 243 (1954).

Former jeopardy, being based on the fundamental legal principle that a person cannot be tried twice for the same offense, is a good plea. *State v. Partlow*, 272 N.C. 60, 157 S.E.2d 688 (1967).

A plea of former jeopardy must be grounded on the same offense both in law and fact. *State v. Partlow*, 272 N.C. 60, 157 S.E.2d 688 (1967).

Former Conviction in Court without Jurisdiction.—Where the conviction by a court without jurisdiction to hear and determine the guilt or innocence of defendants was a nullity and the sentence imposed was void, defendants could thereafter be tried when properly charged in a court having jurisdiction. It is manifest that there is in this no double jeopardy. *State v. Cooke*, 248 N.C. 485, 103 S.E.2d 846 (1958).

Defendants Are Not Twice Put in Jeopardy by Second Arraignment.—Where each defendant has been separately arraigned and has pleaded to the bill of indictment, following which the cases are continued to the next term of court, defendants are not twice put in jeopardy by a second arraignment when the cases are called for trial the following term. *State v. Watson*, 209 N.C. 229, 183 S.E. 286 (1936).

New Trial for Error upon Second Appeal.—Where defendant has been granted a new trial for error in the charge appearing of record and upon appeal from a second conviction the record discloses a kindred error in the charge upon the second trial, a new trial must nevertheless be awarded upon the second appeal, since no person may be deprived of life or liberty except by the law of the land. *State v. Starnes*, 220 N.C. 384, 17 S.E.2d 346 (1941).

Consequences of First Trial Are Wiped Out When Defendant Obtains New Trial.—Defendant in seeking and obtaining a new trial must be deemed to have consented to a wiping out of all the consequences of the first trial. This is not a denial of defendant's constitutional rights not to be deprived of life, liberty and prop-

erty without due process of law or of equal protection of the laws under the Fourteenth Amendment to the United States Constitution and this section. *State v. White*, 262 N.C. 52, 136 S.E.2d 205 (1964).

And Plea of Former Jeopardy Will Avail Him Nothing.—When, in either a post-conviction hearing or a habeas corpus proceeding, at the prisoner's request, the court vacates a judgment against him and directs a new trial, the prisoner waives his constitutional protection against double jeopardy, and he may be tried anew on the same indictment for the same offense. In such case, a plea of former jeopardy will avail him nothing. *State v. Case*, 268 N.C. 330, 150 S.E.2d 509 (1966).

But it is only where the accused himself brings about destruction of the first verdict that he can be retried for the same offense. Where the defendant seasonably abandons his attempt to destroy the verdict which has pronounced him guilty of murder in the second degree, a new trial cannot lawfully be forced upon him after such abandonment. *State v. Case*, 268 N.C. 330, 150 S.E.2d 509 (1966).

An accused will be protected from the subsequent prosecution for the same offense where a valid judgment is set aside by the court on its own motion or upon application of the prosecuting attorney—unless, of course, the accused acquiesces in the action. *State v. Case*, 268 N.C. 330, 150 S.E.2d 509 (1966).

New Trial Is Not Barred by Death of Defendant's Witness.—To hold that when a defendant in a criminal action by his appeal has secured a new trial, he cannot be prosecuted promptly again, because by the death of a witness who would testify in his favor, if alive, at the time of the retrial, he would in such trial by such death and loss of evidence be denied the right of due process of law under the Fourteenth Amendment to the federal Constitution and to the rights of "the law of the land" provision of this section, would mean that some, if not many, cases could not be tried again. *State v. Patton*, 260 N.C. 359, 132 S.E.2d 891 (1963).

When a defendant by his appeal obtains a new trial, the law does not require that the State in order to prosecute him again must guarantee that all his witnesses shall be alive and capable of testifying for him at the retrial, for to require that would be for the law to exact of the State impossibilities. *State v. Patton*, 260 N.C. 359, 132 S.E.2d 891 (1963).

But Defendant Must Be Discharged If State's Essential Witnesses Are Dead.—If a defendant by his appeal secures a new

trial, and if at the time of the new trial the State's essential witnesses are dead or incapable of testifying, the State has no other recourse than to discharge the defendant, no matter how guilty he may be. *State v. Patton*, 260 N.C. 359, 132 S.E.2d 891 (1963).

Plea of Guilty to Offense Which Defendant Not Formally Accused of Committing.

—When the court sentenced petitioner, who had been indicted for a violation of G.S. § 14-26 (carnal knowledge of female virgins between twelve and sixteen years of age), to imprisonment for a term of not less than twelve nor more than fifteen years upon his plea of guilty to a violation of § 14-22 (assault with intent to commit rape) when there was no formal and sufficient accusation against him for the offense to which he pleaded guilty, it would seem to be without precedent, and the sentence of imprisonment was a nullity, and violates petitioner's rights as guaranteed by this section and by § 1 of the Fourteenth Amendment to the United States Constitution and must be vacated in post-conviction proceedings. *McClure v. State*, 267 N.C. 212, 148 S.E.2d 15 (1966).

The question as to whether the defendant in a criminal action has sufficient time to prepare his defense before trial, and has thereby been deprived of his rights under this section, is one addressed to the sound discretion of the trial judge, which will not be reviewed on appeal when it is not made to appear that this discretionary power has been abused by him. *State v. Burnett*, 184 N.C. 783, 115 S.E. 57 (1922).

When Motion for Continuance Presents Question of Law. — Ordinarily, whether a cause shall be continued is a matter which rests in the sound discretion of the trial court and, in the absence of gross abuse, is not subject to review on appeal, but when the motion is based on a right guaranteed by the federal and State Constitutions, the question presented is one of law and not of discretion, and the decision of the court below is reviewable. *State v. Farrell*, 223 N.C. 321, 26 S.E.2d 322 (1943); *State v. Lane*, 258 N.C. 349, 128 S.E.2d 389 (1962).

When a motion for a continuance is based on a right guaranteed by the federal and State Constitutions, the question presented is one of law and not of discretion, and the decision of the court below is reviewable. *State v. Atkinson*, 7 N.C. App. 355, 172 S.E.2d 249 (1970).

Defendant Is Entitled to Time and Opportunity to Investigate and Produce Evidence. — Due process requires that every defendant be allowed a reasonable time

and opportunity to investigate and produce competent evidence, if he can, in defense of the crime with which he stands charged and to confront his accusers with other testimony. *State v. Baldwin*, 276 N.C. 690, 174 S.E.2d 526 (1970).

But due process does not include the right to fish in psychiatric ponds for immaterial evidence. *State v. Baldwin*, 276 N.C. 690, 174 S.E.2d 526 (1970).

Confessions.—In this jurisdiction, when a purported confession of a defendant is offered into evidence and defendant objects, the trial judge, in the absence of the jury, hears evidence of both the State and the defendant upon the question of the voluntariness of defendant's statements. The general rule is that after such inquiry, when there is conflicting evidence offered at the voir dire hearing, the trial judge shall make findings of fact to show the bases of his ruling on the admissibility of the evidence offered. *State v. Moore*, 275 N.C. 141, 166 S.E.2d 53 (1969).

In-Custody Statements. — Every statement made by a person in custody as a result of an illegal arrest is not ipso facto involuntary and inadmissible, but the facts and circumstances surrounding such arrest and the in-custody statement should be considered in determining whether the statement is voluntary and admissible. Voluntariness remains as the test of admissibility. *State v. Moore*, 275 N.C. 141, 166 S.E.2d 53 (1969).

Admissibility of Photographs.—The admission of the photograph of a lineup including the defendant was not violative of his rights under this section and § 23 of this article, where the photograph was properly identified and entered into evidence for the purpose of illustrating the testimony of a witness, and, although the defendant objected to the questions identifying the picture, he did not ask that its admission be restricted. *State v. McKissick*, 271 N.C. 500, 157 S.E.2d 112 (1967).

The privilege against disclosure of an informant's identity is based on the public policy of the furtherance and protection of the public interest in effective law enforcement. However, the privilege must give way where the disclosure of the informer's identity, or of the contents of his communication, is relevant and helpful to the defense of the accused, or is essential to fair determination of a cause. *State v. Moore*, 275 N.C. 141, 166 S.E.2d 53 (1969).

A defendant is not necessarily entitled to elicit the name of an informer from the State's witnesses. *State v. Moore*, 275 N.C. 141, 166 S.E.2d 53 (1969).

Defendants are entitled to question police as to reliability of informer when the constitutional validity of the arrest is challenged. *State v. Moore*, 275 N.C. 141, 166 S.E.2d 53 (1969).

Right of Cross-Examination.—The right of the defendant in a criminal action to cross-examine expert witnesses who have testified their opinion against him is a material one, guaranteed by this section of the Constitution and a denial thereof may not be held as merely a technicality and harmless; nor is this error cured by the fact that he has an opportunity to cross-examine one of these witnesses in refutation of the correctness of the facts upon which his conclusion was based, especially when the other witness is to be regarded as the most important one. *State v. Hightower*, 187 N.C. 300, 121 S.E. 616 (1924).

The "law of the land" guaranteed by this section, synonymous with due process of law, guarantees to one charged with contempt of court by an asserted willful violation of a restraining order a right, when he denies the asserted violation, to confront and cross-examine witnesses by whose testimony the asserted violation is to be established. *Harriet Cotton Mills v. Local 578, Textile Workers Union*, 251 N.C. 218, 111 S.E. 2d 457 (1959).

No Right to Inspect Files of State Bureau of Investigation.—Where there is no contention that anything in the files of the State Bureau of Investigation was admitted in evidence and the record shows that no member of the Bureau testified during the trial, defendants' contention that they were entitled to an inspection of the files of the Bureau in regard to its investigation of the case is untenable and denial of their petition for such inspection does not violate any of their rights under this section of the Constitution of North Carolina, or under the Fifth, Sixth, Seventh, and Fourteenth Amendments to the federal Constitution. *State v. Goldberg*, 261 N.C. 181, 134 S.E.2d 334 (1964).

The unsupported testimony of an accomplice is sufficient to support a conviction if it satisfies a jury of defendant's guilt beyond a reasonable doubt. *State v. Partlow*, 272 N.C. 60, 157 S.E.2d 688 (1967).

Imposition of Punishment in Excess of That Imposed by Inferior Court.—The fact that defendant received a greater sentence in the superior court than he received in the recorder's court is no violation of his constitutional or statutory rights. Upon appeal from an inferior court for a trial de novo in the superior court, the superior court may impose punishment in excess of that imposed in the inferior court provided

the punishment imposed does not exceed the statutory maximum. *State v. Morris*, 275 N.C. 50, 165 S.E.2d 245 (1969).

Where the whole case is tried de novo the former judgment does not fix the maximum punishment which may be imposed after a second conviction. *State v. Morris*, 275 N.C. 50, 165 S.E.2d 245 (1969).

Findings in a proceeding under the Post Conviction Hearing Act, disclosing that petitioners, although jointly tried, were not allowed to communicate with one another prior to trial, and that their attempts to contact witnesses and friends were unsuccessful, did not support the lower court's conclusion of law that petitioners had not been denied any rights guaranteed to them by this section and § 23 of this article and the Fourteenth Amendment to the Constitution of the United States. *State v. Wheeler*, 249 N.C. 187, 105 S.E.2d 615 (1958).

III. TAKING OF PRIVATE PROPERTY FOR PUBLIC USE.

Power of Eminent Domain Is Inherent in Sovereignty.—The power of eminent domain, that is, the right to take private property for public use, is inherent in sovereignty. This section requires payment of fair compensation for the property so taken. This is the only limitation imposed on sovereignty with respect to taking. *Town of Morganton v. Hutton & Bourbonnais Co.*, 251 N.C. 531, 112 S.E.2d 111 (1960).

The power of eminent domain is one of the attributes of a sovereign state. *Redevelopment Comm'n v. Hagins*, 258 N.C. 220, 128 S.E.2d 391 (1962).

The right to take private property for public use exists independently of constitutional provisions. In fact, such provisions are limitations on the State's power to exercise the right. *Redevelopment Comm'n v. Hagins*, 258 N.C. 220, 128 S.E.2d 391 (1962).

But Just Compensation Is Required if Private Property Is Taken.—The principle, forbidding the taking of private property for public use without just compensation, is so grounded in natural equity that it has never been denied to be a part of the law of North Carolina. *Yancey v. North Carolina State Highway & Pub. Works Comm'n*, 222 N.C. 106, 22 S.E.2d 256 (1942).

North Carolina does not have an express constitutional provision against the taking of private property for public use without the payment of just compensation. However, North Carolina recognizes this fundamental right to just compensation

as so grounded in natural law and justice that it is part of the fundamental law of the State, and imposes upon a governmental agency taking private property for public use a correlative duty to make just compensation to the owner of the property taken. This principle is considered in North Carolina as an integral part of "the law of the land" within the meaning of this section. *DeBruhl v. State Highway & Pub. Works Comm'n*, 247 N.C. 671, 102 S.E.2d 229 (1958).

The principle that when private property is taken for public use just compensation must be paid is deeply imbedded in constitutional law, and while the principle is not stated in express terms in the State Constitution, it is regarded as an integral part of "the law of the land." *Eller v. Board of Educ.*, 242 N.C. 584, 89 S.E.2d 144 (1955); *Sale v. State Highway & Pub. Works Comm'n*, 242 N.C. 612, 89 S.E.2d 290 (1955); *Town of Morganton v. Hutton & Bourbonnais Co.*, 251 N.C. 531, 112 S.E.2d 111 (1960).

The constitutional prohibitions against the taking of private property except by due process of law preclude the legislature from sanctioning the taking of a person's property except in satisfaction of a legal obligation or for a public purpose upon the payment of just compensation. In *re Trusteeship of Kenan*, 261 N.C. 1, 134 S.E.2d 85 (1964).

Private property may not be taken even for a public use without compensation. *McKinney v. Deneen*, 231 N.C. 540, 58 S.E.2d 107 (1950).

This section guarantees payment of compensation by sovereign authority. *Braswell v. State Highway & Pub. Works Comm'n*, 250 N.C. 508, 108 S.E.2d 912 (1959); *Midgett v. North Carolina State Highway Comm'n*, 260 N.C. 241, 132 S.E.2d 599 (1963).

The requirement that just compensation be paid for land condemned for a public use is guaranteed both by the federal Constitution (Fourteenth Amendment) and this section. *City of Raleigh v. Mercer*, 271 N.C. 114, 155 S.E.2d 551 (1967).

The exercise of the power to condemn land for public use is always subject to the principle that there must be definite and adequate provisions made for reasonable compensation to the owner. *City of Raleigh v. Mercer*, 271 N.C. 114, 155 S.E.2d 551 (1967).

The private property of a citizen cannot be taken for a public use by the State or by a municipal corporation without the payment of just compensation. This legal requirement is guaranteed by this section.

Carolina Beach Fishing Pier v. Town of Carolina Beach, 274 N.C. 362, 163 S.E.2d 363 (1968).

For article on eminent domain in North Carolina, see 35 N.C.L. Rev. 296 (1957).

When a sanitary district in the exercise of its power of eminent domain, took easements and rights-of-way for sewer lines over the lands of defendants, it became obligated by the North Carolina Constitution and by G.S. § 130-130, under which it acted, to pay to defendants just compensation for the damage done. *North Asheboro-Central Falls Sanitary Dist. v. Canoy*, 252 N.C. 749, 114 S.E.2d 577 (1960).

And This Requirement Is Self-Executing.—The constitutional prohibition against taking the private property of a citizen for public use without the payment of just compensation is self-executing and is not subject to impairment by legislation. *Carolina Beach Fishing Pier v. Town of Carolina Beach*, 274 N.C. 362, 163 S.E.2d 363 (1968).

A constitutional prohibition against taking or damaging private property for public use without just compensation is self-executing, and neither requires any law for its enforcement nor is susceptible of impairment by legislation. *Midgett v. North Carolina State Highway Comm'n*, 260 N.C. 241, 132 S.E.2d 599 (1963).

Thus a citizen may sue the State or one of its subdivisions, namely, a municipality, for taking his private property for a public purpose under the Constitution where no statute affords an adequate remedy. *Carolina Beach Fishing Pier v. Town of Carolina Beach*, 274 N.C. 362, 163 S.E.2d 363 (1968).

The prohibition against the taking of private property for a public use without just compensation is self-executing, and when no statute provides procedure to recover compensation under the circumstances of the taking, the owner may maintain an action to obtain just compensation therefor. *Guilford Realty & Ins. Co. v. Blythe Bros. Co.*, 260 N.C. 69, 131 S.E.2d 900 (1963).

The exercise of the power of eminent domain by a corporation authorized by its charter to generate and sell electricity, and given power of eminent domain to acquire the necessary rights-of-way and lands for its dams cannot be said to be exercising this power in a private capacity in contravention of this section. *Whiting Mfg. Co. v. Carolina Aluminum Co.*, 207 N.C. 52, 175 S.E. 698 (1934).

Eminent Domain by Park Commission.—The exercise of the power of eminent do-

main by the North Carolina National Park Commission under Public Laws 1927, c. 48, is not contrary to the "due process" clause of the State Constitution. *Yarborough v. North Carolina Park Comm'n*, 196 N.C. 284, 145 S.E. 563 (1928). See also *Suncrest Lumber Co. v. North Carolina Park Comm'n*, 30 F.2d 121 (W.D.N.C. 1929).

Only those whose interests in the particular lands sought to be taken for the national park contemplated by c. 48, Public Laws of 1927, § 27, may sue in equity for injunctive relief on the ground that their lands are about to be taken contrary to the provisions of the Fourteenth Amendment to the federal Constitution and of this section. *Yarborough v. North Carolina Park Comm'n*, 196 N.C. 284, 145 S.E. 563 (1928).

Eminent Domain by County Commission.—See *Hill v. Board of Comm'rs*, 190 N.C. 123, 129 S.E. 154 (1925).

Property May Be Taken Only for Public Use.—In the exercise of the power of eminent domain, private property can be taken only for a public purpose or, more properly speaking, a public use upon payment of just compensation. This principle is so grounded in natural equity that it has never been denied to be an essential part of "the law of the land" within the meaning of this section. *Redevelopment Comm'n v. Security Nat'l Bank*, 252 N.C. 595, 114 S.E.2d 688 (1960).

To take property without the owner's consent for a nonpublic use, even though he be paid its full value, is a violation of this section and of the due process clause of the Fourteenth Amendment. *State Highway Comm'n v. Thornton*, 271 N.C. 227, 156 S.E.2d 248 (1967), commented on in 46 N.C.L. Rev. 663 (1968); *North Carolina State Highway Comm'n v. Asheville School, Inc.*, 5 N.C. App. 684, 169 S.E.2d 193 (1969).

What is a "public use" justifying the exercise of the power of eminent domain cannot be stated with precision for all cases. Each case must be evaluated in the light of its peculiar circumstances and the then current opinion as to the proper function of government. *State Highway Comm'n v. Thornton*, 271 N.C. 227, 156 S.E.2d 248 (1967), commented on in 46 N.C.L. Rev. 663 (1968).

The economic benefits to the community, anticipated from the attraction to it of a large and wealthy prospective employer, are not determinative of whether property taken in order to accomplish that purpose is taken for a "public use." The home or other property of a poor man cannot be taken from him by eminent domain and turned over to the private use

of a wealthy individual or corporation merely because the latter may be expected to spend more money in the community, even though he or it threatens to settle elsewhere if this is not done. This the Constitution forbids. *State Highway Comm'n v. Thornton*, 271 N.C. 227, 156 S.E.2d 248 (1967), commented on in 46 N.C.L. Rev. 663 (1968).

Public and Private Roads.—Though a road be called a public road by the governmental agency which builds it, if, in reality, it is by its very nature and location to be used only by one family or corporation, save for occasional incidental use by visitors, it is not a public road and the property of another person cannot be taken for its construction under the power of eminent domain. *State Highway Comm'n v. Thornton*, 271 N.C. 227, 156 S.E.2d 248 (1967), commented on in 46 N.C.L. Rev. 663 (1968).

A road used by large numbers of people to reach their place of employment and by many others to reach the place at which they will transact business cannot be said to be a private road for the sole benefit of the proprietor whose plant is located at its terminus. *State Highway Comm'n v. Thornton*, 271 N.C. 227, 156 S.E.2d 248 (1967), commented on in 46 N.C.L. Rev. 663 (1968).

Limitation on Use of Property Taken.—A sanitary district, acting under G.S. § 130-130 to acquire easements to construct and maintain sanitary sewer lines, can use the property taken for only the limited purpose described in the petition, and any other use by it or anyone else would require additional compensation. *North Asheboro-Central Falls Sanitary Dist. v. Canoy*, 252 N.C. 749, 114 S.E.2d 577 (1960).

Property May Not Be Taken for Unlawful Purpose.—The land of a person may not be taken, without his consent, when the purpose, which would otherwise authorize the taking, cannot be accomplished as a matter of law. *Vance County v. Royster*, 271 N.C. 53, 155 S.E.2d 790 (1967).

For a county to take land from the owners without their consent for a use incidental to a proposed airport, which airport the county may not lawfully construct and operate, would be a vain and utterly useless deprivation of the landowners' rights in their property and such an arbitrary, capricious taking of their land would be a violation of this section. *Vance County v. Royster*, 271 N.C. 53, 155 S.E.2d 790 (1967).

Limitation on Taking Property Protects Lunatic.—The constitutional limitation

against taking of property of a citizen affords the same protection to a lunatic that it affords to a person of sound mind. In re Trusteeship of Kenan, 261 N.C. 1, 134 S.E.2d 85 (1964).

It Applies to Interest and Principal. — The constitutional provision that no person shall be deprived of his property except by the law of the land applies to interest or earnings on funds in the same manner as it applies to principal. *McMillan v. Robeson County*, 262 N.C. 413, 137 S.E.2d 105 (1964).

Impairment in Use of Land as a Taking. — Where sewage disposal device operated by school board was constructed and operated so as to cause sewage to flow or seep onto plaintiffs' land, and by reason of such continuous pollution and the noxious odors emanating continuously therefrom, plaintiffs' spring was rendered unfit for use and their dwelling was rendered unfit for habitation, such constituted a taking by the school board to the extent of the impairment in value of plaintiffs' land caused thereby. *Eller v. Board of Educ.*, 242 N.C. 584, 89 S.E.2d 144 (1955).

A nuisance maintained by a governmental agency impairing private property is a taking in the constitutional sense. *Midgett v. North Carolina State Highway Comm'n*, 260 N.C. 241, 132 S.E.2d 599 (1963).

The right to have water flow in the direction provided by nature is a property right, and if such right of a landowner is materially interfered with so that his land is flooded by the manner in which a highway is constructed, it is a nuisance and a taking of property for public use for which compensation must be paid. *Midgett v. North Carolina State Highway Comm'n*, 260 N.C. 241, 132 S.E.2d 599 (1963).

Constructing Barricade across Street Is Not Taking. — Where the State has authorized the construction of a barricade across a street, thereby closing it to vehicular traffic in one direction, the owner of land abutting the street on the cul-de-sac thus created has not been deprived of his property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States or this section, though the value of his property has been impaired and the State has not compensated him for such loss of value. *Wofford v. North Carolina State Highway Comm'n*, 263 N.C. 677, 140 S.E.2d 376 (1965).

Substituting Service Road for Direct Access Is Damnum absque Injuria. — Since the substitution of a service road for direct access theretofore enjoyed by an abut-

ting property owner is an exercise of the police power, any diminution in the value of petitioners' property is *damnum absque injuria*. *Moses v. State Highway Comm'n*, 261 N.C. 316, 134 S.E.2d 664 (1964).

Appropriation of Private Water Lines by City. — When a city appropriated plaintiffs' property to its own use by exercising control and dominion over water lines laid by plaintiffs in territory subsequently included in the extended city limits this appropriation imposed on the city a duty to pay the fair value of the property taken. *Styers v. City of Gastonia*, 252 N.C. 572, 114 S.E.2d 348 (1960).

Measure of Damages. — Petitioners, whose property had been taken for public use by an agency of the State government, and who had been physically dispossessed and ejected therefrom by a court order, were entitled to have the jury award them as compensation not only the fair market value of their property as of the date of the taking, but also some additional sum for the substantial delay in the payment of the fair market value of their property so taken, as an element of the just compensation guaranteed by this section. *DeBruhl v. State Highway & Pub. Works Comm'n*, 247 N.C. 671, 102 S.E.2d 229 (1958).

Highway Commission Cannot Decide It Does Not Want Property Taken. — To permit the Highway Commission to decide, subsequent to a taking, that it did not want the property it had taken, and for that reason refuse to pay, would do violence to the provisions of this section. *North Carolina State Highway Comm'n v. York Indus. Center*, 263 N.C. 230, 139 S.E.2d 253 (1964).

The statute, authorizing the State Highway Commission to enter upon and take possession of lands before bringing condemnation proceedings and before making compensation, is not an infraction of constitutional rights and does not deprive an owner of notice and opportunity to be heard. *North Carolina State Highway Comm'n v. Young*, 200 N.C. 603, 158 S.E. 925 (1931).

IV. MATTERS RELATING TO TAXATION.

Classification for Tax Purposes. — The legislature may levy a sales tax or a tax on the business of selling tangible personal property, levied as a license or privilege tax, and classify trades, callings, and occupations for the imposition of a tax, and classify articles sold as the basis for computing the tax, exempting certain classes of articles and providing a graduated tax as to other classes of articles, or differentiate

in the method of collecting the tax as to some of the classes, provided the levy applies equally and uniformly to all who fall within each particular classification, and provided the classifications are reasonable and based upon some real distinction. *Leonard v. Maxwell*, 216 N.C. 89, 3 S.E.2d 316 (1939). See also *Caldwell Land & Lumber Co. v. Smith*, 146 N.C. 199, 59 S.E. 653 (1907).

The North Carolina law imposes the sales tax on all retailers, as a class, and applies it alike in its exactions and exemptions to all persons belonging to the prescribed class. *Piedmont Canteen Serv. v. Johnson*, 256 N.C. 155, 123 S.E.2d 582 (1962).

Perfect equality in the collection of the tax by retailers from consumers is, as a practical matter, impossible as between almost any two or more retailers by reason of the differences in types of merchandise sold and selling methods. *Piedmont Canteen Serv. v. Johnson*, 256 N.C. 155, 123 S.E.2d 582 (1962).

Taxation Exemptions.—The provision of Art. V, Schedule E, of the Revenue Act of 1937, making a distinction between wholesale and retail merchants, and exempting sales of ice, medicines on a prescription, fish and farm products when sold in the original or unmanufactured state, commercial fertilizer, agricultural lime and plaster, public school books, sale of used or repossessed articles, and sales to the government or governmental agencies, etc., constitute classifications based upon reasonable and real distinctions, and an allegation that the act is void as imposing arbitrary discriminations in making such classifications is untenable. *Leonard v. Maxwell*, 216 N.C. 89, 3 S.E.2d 316 (1939).

Irregular Taxation.—It is a fundamental principle in the law of taxation that taxes may only be levied for public purposes and for the benefit of the public on whom they are imposed, and to lay these burdens upon one district for benefits appertaining solely to another is in clear violation of established principles of right and contrary to the express provisions of this section, which forbids that any person shall be dispossessed of his freehold liberties and privileges or in any manner deprived of his life, liberty or property but by the law of the land. *Commissioners of Johnston County v. Lacy*, 174 N.C. 141, 93 S.E. 482 (1917); *Hinton v. Lacy*, 193 N.C. 496, 137 S.E. 669 (1927); *Board of Comm'rs v. Hanchett Bond Co.*, 194 N.C. 137, 138 S.E. 614 (1927).

Opportunity to Be Heard with Respect to Tax Liability Required.—The constitu-

tional provisions guaranteeing due process under this section and the Fourteenth Amendment to the federal Constitution are mandatory and require an opportunity to be heard with respect to asserted tax liability. *Kirkpatrick v. Currie*, 250 N.C. 213, 198 S.E.2d 209 (1959).

Tax Statute Not Providing for Notice and Hearing.—An act which permits the governing board of a town to list, value and revalue all property within its limits separately and independently of G.S. § 105-333 without providing for notice and hearing as to such valuations, and without setting up precise standards for evaluation, contravenes due process of law and is unconstitutional. *Bowie v. Town of West Jefferson*, 231 N.C. 408, 57 S.E.2d 369 (1950).

Assessments without Notice, etc., Are Void.—Street assessments made under charter provisions failing to provide notice and an opportunity to be heard to those assessed are void as violating due process of law, and may not be validated by curative acts of the legislature. *City of Lexington v. Lopp*, 210 N.C. 196, 185 S.E. 766 (1936).

Creation of Taxing District without Hearing.—Section 131-126.33 et seq. of the General Statutes, as amended, providing for the creation of a taxing district without providing for a hearing on the benefits to be conferred upon the property therein, does not violate this section. *Williamson v. Snow*, 239 N.C. 493, 80 S.E.2d 262 (1954).

Statute Providing Service of Summons by Publication on Taxpayers Is Valid.—A statute conferring jurisdiction upon the superior courts of the counties over citizens and owners of taxable property within the county without requiring each such owner or citizen to be named as a party in the complaint or summons, and providing for service of summons by publication, is not a violation of this section. *Castevens v. Stanly County*, 211 N.C. 642, 191 S.E. 739 (1937).

Sale of Land for Taxes.—For a valid sale of land for taxes, the tax list and notice of sale must contain a sufficiently definite description of the land to allow the land to be identified, and to be notice to those persons whose interest is to be affected, and if the description is not so definite, a sale thereunder will be void as not complying with the statute, and as taking property without giving notice and as not affording those whose property is sold an opportunity to be heard. *Bryson v. McCoy*, 194 N.C. 91, 138 S.E. 420 (1927).

Forfeiture of property and vesting its

title in another for tax delinquency by mere legislative declaration is the taking of property without due process of law. *Eason v. Spence*, 232 N.C. 579, 61 S.E.2d 717 (1950).

Determining Rate of Inheritance Tax by Value of Decedent's Estate Wherever Located.—The "due process" provisions of the federal or State Constitution are not violated by use of the value of decedent's entire estate, wherever located, to determine the rate of inheritance tax to be applied under G.S. § 105-21 to the transfer of property within the State. *Rigby v. Clayton*, 274 N.C. 465, 164 S.E.2d 7 (1968).

Inheritance Tax upon Nonresident Distributees Held Valid.—See *Rhode Island Hosp. Trust Co. v. Doughton*, 187 N.C. 263, 121 S.E. 741 (1924).

Employment Security Tax.—Imposition of the employment security tax does not deprive an individual who operates three places of business, employing in the aggregate more than 8 employees, of property without due process of law or deny him of the equal protection of the laws. *State ex rel. Unemployment Compensation Comm'n v. J.M. Willis Barber & Beauty Shop*, 219 N.C. 709, 15 S.E.2d 4 (1941).

Free or reduced telephone service to municipalities is a tax prohibited by law, and is discriminatory both as between towns which are similarly situated and as between those towns and individual rate payers living in towns or in the country. Hence, G.S. § 160-281.2 is unconstitutional (1) because it offends the due process provisions of both State and federal Constitutions, (2) because it is not a uniform tax, (3) because it interferes with vested rights, and (4) because it is an attempt to surrender the police power of the State. *State ex rel. North Carolina Util. Comm'n v. City of Wilson*, 252 N.C. 640, 114 S.E.2d 786 (1960).

Municipal Tax to Finance Water and Sewer Facilities in Area to Be Annexed.—A municipal corporation may issue bonds and levy taxes to pay principal and interest thereon and use the proceeds to finance the extension of water and sewer facilities into an area to be annexed at a fixed future date after the residents of the area to be annexed have approved the annexation and the citizens of the municipality have approved both the annexation and the issuance of bonds. Such bonds are for a public purpose, and the tax imposed within the municipality prior to annexation does not deprive the taxpayers of the city of property without due process of law. *Thomasson v. Smith*, 249 N.C. 84, 105 S.E.2d 416 (1958).

V. ILLUSTRATIVE CASES.

Statutes declaring that the right to work shall not be dependent upon membership or nonmembership in a labor union, and prohibiting certain agreements between employers and labor organizations (G.S. §§ 95-78 through 95-84), do not violate this section. *State v. Whitaker*, 228 N.C. 352, 45 S.E.2d 860 (1947), *aff'd*, 335 U.S. 525, 69 S. Ct. 251, 93 L. Ed. 212 (1949).

Right to Earn Livelihood as Restaurateur.—The constitutional right to earn a livelihood by engaging in the restaurant business is not infringed by either the Turlington Act or the ABC Act. *D & W, Inc. v. City of Charlotte*, 268 N.C. 577, 151 S.E.2d 241 (1966).

Statute providing for licensing and supervision of photographers held violative of this section. *State v. Ballance*, 229 N.C. 764, 51 S.E.2d 731 (1949), *overruling State v. Lawrence*, 213 N.C. 674, 197 S.E. 586, 116 A.L.R. 1366 (1938).

Statute Regulating Practice of Optometry.—A portion of G.S. § 90-115, relating to the practice of optometry, was held violative of this section. *Palmer v. Smith*, 229 N.C. 612, 51 S.E.2d 8 (1948).

Statute Providing for Tile Contractor's License.—Section 87-28 et seq. of the General Statutes, requiring a license for any person, firm or corporation undertaking to lay, set or install ceramic tile, marble or terrazzo floors or walls, violates this section. *Roller v. Allen*, 245 N.C. 516, 96 S.E.2d 851 (1957).

Act Licensing Hauling of Lumber Held Valid.—See *State v. Bullock*, 161 N.C. 223, 75 S.E. 942 (1912). See also *Dalton v. George C. Brown & Co.*, 159 N.C. 175, 75 S.E. 40, 42 L.R.A. (n.s.) 506 (1912); *Southeastern Express Co. v. City of Charlotte*, 186 N.C. 668, 120 S.E. 475 (1923).

Regulation of Junk Yards.—See note to G.S. § 14-399.

"Grandfather Clause".—Because of the possible retroactive application of the grandfather rights provided for in the enabling act, paragraph a 2 of G.S. § 153-9 (58), the paragraph is unconstitutional since it invades the personal and property rights guaranteed and protected by Art. I, §§ 1, 19, 32 and 34 of the Constitution. *Whaley v. Lenoir County*, 5 N.C. App. 319, 168 S.E.2d 411 (1969).

Statute making certain war veterans eligible for license to practice barbering without standing an examination did not violate this section. *Motley v. State Bd. of Barber Exmrs.*, 228 N.C. 337, 45 S.E.2d 550, 175 A.L.R. 253 (1947).

Minimum Retail Prices on Trade-Marked Goods.—The North Carolina Fair Trade

Act, permitting the establishment of minimum retail prices on trade-marked goods by agreement, does not deprive a retailer not a party to a contract with the manufacturer or distributor of any property right in preventing such retailer from selling the trade-marked article at a price less than that stipulated by contract, since such retailer acquires title with knowledge and subject to the stipulations relative to the minimum retail price permitted by the law in protecting the property right of the manufacturer or distributor in his trademark and good will, which property right subsists while the goods bear his trademark, even after he has parted with title of commodity itself. *Ely Lilly & Co. v. Saunders*, 216 N.C. 163, 4 S.E.2d 528, 125 A.L.R. 1308 (1939).

Milk Commission Act and Order Pursuant Thereto. — See note to G.S. § 106-266.8.

Regulation of Use, Manufacture or Sale of Beer.—Under its inherent police power, the State has the power to prohibit, regulate or restrain the use, manufacture or sale of beer within its bounds. *Boyd v. Allen*, 246 N.C. 150, 97 S.E.2d 864 (1957).

A retail beer permit grants the holder a special privilege limited by the statutes under which it is granted, and such permit is not a contract, or property right, or vested right in any legal or constitutional sense. *Boyd v. Allen*, 246 N.C. 150, 97 S.E.2d 864 (1957), upholding legislation providing for revocation or suspension of a retail beer permit for violation of G.S. § 18-78.1. See G.S. § 18-78 and note thereto.

Valid Insurance Policy Entitled to Enforcement as Written.—Where a provision in an insurance policy is a valid one, the parties are entitled to have it enforced as written, and the Supreme Court cannot ignore any part of the contract. *Muncie v. Travelers Ins. Co.*, 253 N.C. 74, 116 S.E.2d 474 (1960).

Due Process Is Not Denied by Requiring Insurance Company to Issue Assigned Risk Liability Policy.—The fact that an insurance company is required to issue assigned risk motor vehicle liability policies as a condition of transacting liability insurance business in North Carolina does not constitute a denial of due process in violation of State and federal constitutional provisions. *Jones v. State Farm Mut. Auto. Ins. Co.*, 270 N.C. 454, 155 S.E.2d 118 (1967).

Nor by Making Insurer Absolutely Liable on Assigned Risk Policy.—Subsection (f) (1) of G.S. § 20-279.21 when applied to an assigned risk insurance policy issued in compliance with the plan set forth in §

20-279.34 and regulations pursuant thereto, does not deprive an insurance company of its property without due process of law and otherwise than by the law of the land in contravention of the Fourteenth Amendment to the Constitution of the United States, this section, and § 1 of this article. *Jones v. State Farm Mut. Auto. Ins. Co.*, 270 N.C. 454, 155 S.E.2d 118 (1967).

Nor by Requiring Insurer to Pay Default Judgment Obtained Without Notice.—An insurance company who has been required to issue an assigned risk policy in accordance with G.S. § 20-279.34, is not denied due process in violation of the Fourteenth Amendment of the federal Constitution or in violation of this section and § 1 of this article by being required to pay an injured third party damages established by a default judgment obtained against its insured, even though insurer had no notice of the accident or the action against its insured, nothing else appearing and there being no question of collusion between insured and the injured third party. *Jones v. State Farm Mut. Auto. Ins. Co.*, 270 N.C. 454, 155 S.E.2d 118 (1967).

Statute Providing for Service of Process on Foreign Corporation Not Doing Business in State.—See note to G.S. § 55-145.

The delegation of authority to counties to construct water and sewer systems, contained in G.S. § 153-9, subdivision (46), does not violate this section. *Ramsey v. Rollins*, 246 N.C. 647, 100 S.E.2d 55 (1957).

A statute prohibiting a city from charging residents of adjacent sanitary districts for water at a higher rate than is charged residents of the city does not violate this section. *Candler v. City of Asheville*, 247 N.C. 398, 101 S.E.2d 470 (1958), holding ch. 399, Public-Local Laws 1933, valid.

Construction of Water and Sewerage Facilities by Municipality Outside Its Corporate Limits.—The expenditure of funds for the construction of water and sewerage facilities by a municipality, outside its corporate limits, if done pursuant to legislative authority, is for a public purpose and is not violative of this section. *Thomasson v. Smith*, 249 N.C. 84, 105 S.E.2d 416 (1958).

Drainage Laws.—See *Lang v. Carolina Land & Dev. Co.*, 169 N.C. 662, 86 S.E. 599 (1915).

Local bond issue of town of Lake Lure held not to violate this section. *Keeter v. Town of Lake Lure*, 264 N.C. 252, 141 S.E.2d 634 (1965).

Law Authorizing Issue of Bonds. — Where a valid act authorizing a county to issue bonds has been passed in accordance with the provisions of the State Constitu-

tion, Art. II, § 23, leaving out the requirement that the question must first be submitted to the qualified voters, and another act ratified a few days later makes this requirement, the two acts will be construed in *pari materia*, and the later as not having a retroactive effect, and the county does not acquire a vested right under the first ratified act. *Graham County v. WK. Terry & Co.*, 194 N.C. 22, 138 S.E. 443 (1927).

Zoning Regulations.—The fact that a lot would be more valuable if devoted to a nonconforming use does not deprive the owner of property without due process of law when the zoning regulations are uniform in their application to all within the respective districts, and the differentiation of the uses of property within the respective districts is in accordance with a comprehensive plan in the interest of the health, safety, morals or general welfare of the entire community. *Kinney v. Sutton*, 230 N.C. 404, 53 S.E.2d 306 (1949).

Requiring Railroad to Pay Entire Expense of Rebuilding Trestle.—A municipal ordinance requiring a railway company to pay the entire expense of rebuilding an overpass trestle to accommodate the opening of a new street was, under the facts, an unreasonable exercise of the police power, amounting to an invasion of the company's property rights in violation of the constitutional guarantee provided by this section. *City of Winston-Salem v. Southern Ry.*, 248 N.C. 637, 105 S.E.2d 37 (1958).

Allocating Costs of Grade Crossing Improvements.—A state or its subdivisions, in the exercise of the police power, may validly allocate a portion, or under some circumstances even all, of the costs of grade crossing improvements to the railroads provided the allocation of costs is fair and reasonable under all existing circumstances. *Southern Ry. v. City of Winston-Salem*, 4 N.C. App. 11, 165 S.E.2d 751 (1969).

Sale of Property at Foreclosure.—This section is not violated by G.S. § 45-21.34, regulating the sale of real property upon the foreclosure of mortgages or deeds of trust. *Woltz v. Asheville Safe Deposit Co.*, 206 N.C. 239, 173 S.E. 587 (1934).

The State may proceed directly or by authorization to others to sell lands for taxes upon proceedings to enforce a lien for the taxes thereon, and a publication of notice to all interested in the lands to appear and defend their rights is not a taking of property inhibited by this section. *Orange County v. Jenkins*, 200 N.C. 202, 156 S.E. 774 (1931).

Section 45-21.36 of the General Statutes is constitutional and valid, since it recognizes the obligation of the debtor to pay his debt and the right of the creditor to enforce payment by action in accordance with the terms of the agreement, but provides merely for judicial supervision of sales under power to the end that the price bid at the sale shall not be conclusive as to the value of the property, and that the creditor may not recover any deficiency after applying the purchase price to the notes without first accounting for the fair value of the property in accordance with well-settled principles of equity. *Richmond Mtge. & Loan Corp. v. Wachovia Bank & Trust Co.*, 210 N.C. 29, 185 S.E. 482 (1936).

To permit an operating receiver to hazard the property rights of lienholders without their consent in a perilous private enterprise merely because the court may entertain the uncertain hope that some pecuniary advantage might thereby be obtained for the general creditors or some other third persons would transgress the basic concept enshrined in this section that no person can be deprived of his property except by his own consent or the law of the land. *National Sur. Corp. v. Sharpe*, 236 N.C. 35, 72 S.E.2d 109 (1952).

Proceeding by clerk on application for letters of administration held violative of this section. See note to subdivision (4) of G.S. § 28-8.

Heir Not Bound by Judgment against Administrator.—See note to G.S. § 28-98.

Section 30-3 (b) of the General Statutes Not Discriminatory or Capricious.—Section 30-3 (b) of the General Statutes, which provides that a second or successive spouse who dissents from the will of his deceased spouse shall take only one half the amount provided by the Intestate Succession Act for the surviving spouse if the testator has surviving him lineal descendants by a former marriage but there are no surviving lineal descendants by the second or successive marriage, is not arbitrarily discriminatory and capricious so as to be violative of the due process provisions of the federal and State Constitutions. *Vinson v. Chapell*, 275 N.C. 234, 166 S.E.2d 686 (1969).

Former G.S. § 115-253 Unconstitutional.—The provisions of former G.S. § 115-253 as to the approval by the State Board of Education of the instructional and sales methods and solicitors of nonresident business, trade or correspondence schools were clearly an unwarranted delegation of legislative power, and a conviction and punishment under the criminal provisions thereof violated "the law of the land" under this section. *State v. Williams*, 253 N.C. 337,

117 S.E.2d 444 (1960), decided prior to the 1961 amendment of article 31 of chapter 115.

Chapter 1177, Session Laws of 1967, which authorizes the State Education Assistance Authority to issue revenue bonds and to use the proceeds therefrom for making loans to "residents of this State to enable them to obtain an education in an eligible institution," does not unconstitutionally authorize use of public funds in violation of this section. *State Educ. Assistance Authority v. Bank of Statesville*, 276 N.C. 576, 174 S.E.2d 551 (1970).

The provisions of former G.S. § 116-149 (b), defining those eligible for scholarships as children of veterans resident of North Carolina at the time of induction or a veteran's child who was born in North Carolina and had lived here continuously since birth, were not unconstitutional as discriminating against children of disabled veterans who had moved their residence to this State after birth of the children. *Ramsey v. North Carolina Veterans Comm'n*, 261 N.C. 645, 135 S.E.2d 659 (1964).

Section 14-72.1 of the General Statutes violates neither this section nor the due process clause of the federal Constitution, by reason of vagueness and uncertainty, and of not informing a person of ordinary intelligence with reasonable precision of the acts it prohibits. *State v. Hales*, 256 N.C. 27, 122 S.E.2d 768 (1961).

Section 14-134 of the General Statutes is not too indefinite and vague to be enforceable under this section and the due process clause of the Fourteenth Amendment. *State v. Avent*, 253 N.C. 580, 118 S.E.2d 47 (1961).

Section Not Violated by G.S. § 14-273.—Neither the enactment of G.S. § 14-273 nor its enforcement against certain defendants violated the law of the land clause of this section. *State v. Wiggins*, 272 N.C. 147, 158 S.E.2d 37 (1967).

Section 14-353 of the General Statutes Is Constitutional.—The first two parts of G.S. § 14-353 are not repugnant to the "due process of law" clause of the Fourteenth Amendment to the United States Constitution, and to "the law of the land" clause of

this section, and are a reasonable and proper exercise of the police power of the State. *State v. Brewer*, 258 N.C. 533, 129 S.E.2d 262 (1963).

Section 19-1 et seq. of the General Statutes, providing for the abatement of public nuisances by temporary order without bond, and the sale of the personality and the closing of the property for one year upon the finding of the jury, is constitutional, and does not impinge on this section of the Constitution, or Art. XIV, § 1, of the federal Constitution. *State ex rel. Carpenter v. Boyles*, 213 N.C. 432, 196 S.E. 850 (1938).

Imposing Liability on Parents for Child's Willful Tort.—The enactment of G.S. § 1-538.1, imposing liability on parents for malicious destruction of school property by child, is within the police power of the State of North Carolina, and that it is not violative of the provisions of this section of the State Constitution, or of the provisions of the Fifth Amendment to the federal Constitution. *General Ins. Co. of America v. Faulkner*, 259 N.C. 317, 130 S.E.2d 645 (1963).

Statute Requiring Motorcycle Operator to Wear Protective Helmet.—The requirement of G.S. § 20-140.2 (b) that the operator of a motorcycle on a public highway wear a protective helmet is constitutional as a valid exercise of the police power since the statute bears a real and substantial relationship to public safety. *State v. Anderson*, 275 N.C. 168, 166 S.E.2d 49 (1969).

Section 20-140.2 (b) of the General Statutes does not contravene any provision of either the State or federal Constitution. *State v. Anderson*, 3 N.C. App. 124, 164 S.E.2d 48 (1968).

Collection of Payment from Only Those Tubercular Patients Who Can Pay.—The law makes no unconstitutional discrimination between classes when it charges all tubercular patients the same rate but actually collects from only those who can pay. *Graham v. Reserve Life Ins. Co.*, 274 N.C. 115, 161 S.E.2d 485 (1968).

Default Judgment Restraining Pastor from Appearing at Church.—See same catchline under § 1 of this article.

Sec. 20. General warrants. General warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted.

Cross Reference.—As to search warrants, see G.S. § 15-25 et seq. and the notes there-to.

Editor's Note.—The provisions of this section are similar to those of Art. I, § 15,

Const. 1868, and the cases in the following annotation were decided under that section.

For a discussion of the statute enacted pursuant to this provision, see 15 N.C.L.

Rev. 101. As to limitations on investigating officers, see 15 N.C.L. Rev. 229. For case law survey as to searches and seizures, see 45 N.C.L. Rev. 931 (1967).

This provision is a limitation on State and local officers. 15 N.C.L. Rev. 232.

General Warrants Forbidden. — Judicial warrants, general in terms and unsupported by preliminary oath or sworn evidence and for conduct not committed in the immediate presence of the magistrate, are forbidden by the federal Constitution, Amendment IV, and by this section. *Brewer v. Wynne*, 163 N.C. 319, 79 S.E. 629, 1915B, Ann. Cas. 319 (1913).

Proper Warrant Required. — Ordinarily even the strong arm of the law may not invade one's dwelling except under authority of a proper search warrant. In *re Walters*, 229 N.C. 111, 47 S.E.2d 709 (1948); *State v. Robbins*, 275 N.C. 537, 169 S.E.2d 858 (1969).

An arrest without warrant except as authorized by statute is illegal. *State v. Moore*, 275 N.C. 141, 166 S.E.2d 53 (1969).

A warrant must sufficiently identify the person accused. *Carson v. Doggett*, 231 N.C. 629, 58 S.E.2d 609 (1950).

Protection Extends to Guilty as Well as Innocent. — The fundamental law protects a person from the search of his private dwelling without a warrant, which protection extends to all equally, the guilty as well as the innocent. *State v. Mills*, 246 N.C. 237, 98 S.E.2d 329 (1957).

The protection against illegal search extends to the justly, as well as to the unjustly, accused. *State v. Hall*, 264 N.C. 559, 142 S.E.2d 177 (1965).

An unlawful search does not become lawful by the discoveries which result from it. *State v. Hall*, 264 N.C. 559, 142 S.E.2d 177 (1965).

The constitutional guaranty applies only in those instances where the seizure is assisted by a necessary search. *State v. Colson*, 274 N.C. 295, 163 S.E.2d 376 (1968).

It does not prohibit a seizure without warrant where there is no need of a search, and where the contraband subject matter is fully disclosed and open to the eye and hand. *State v. Colson*, 274 N.C. 295, 163 S.E.2d 376 (1968).

Production of Search Warrant.—Where a search is made under conditions requir-

ing the issuance of a search warrant, and it is attempted, over objection, to justify the search and seizure by the possession of a valid search warrant in the hands of the searchers, the State must produce the search warrant, or, if it has been lost, the State must prove such fact and then introduce evidence to show its contents and regularity on its face, unless the production of the warrant is waived by the accused. *State v. McMilliam*, 243 N.C. 771, 92 S.E.2d 202 (1956).

Waiver of Protection.—By a voluntary waiver and consent to search, free from coercion, duress or fraud, and not given merely to avoid resistance, a defendant relinquishes the protection of the Fourth Amendment to the United States Constitution, which prohibits unreasonable searches and seizures, and also relinquishes the protection given by this section against an unlawful search and seizure. *State v. Little*, 270 N.C. 234, 154 S.E.2d 61 (1967).

If one voluntarily permits or expressly invites and agrees to a search, being cognizant of his rights, such conduct amounts to a waiver of his constitutional protection. *State v. Colson*, 274 N.C. 295, 163 S.E.2d 376 (1968).

Wife Cannot Consent to Search of Home for Husband's Possessions. — The wife has no authority to consent to a search of the home in regard to the possessions of the husband, and therefore, stolen property recovered from the home while the husband was lodged in jail is incompetent in evidence against him. *State v. Hall*, 264 N.C. 559, 142 S.E.2d 177 (1965).

Confession after Confrontation with Articles Obtained by Illegal Search.—Where a confession is obtained from defendant after confronting him with stolen property recovered from his home in an unlawful search without a warrant, the court must find whether such confession was actually free and voluntary or whether it was triggered by the use of the articles obtained by the illegal search. *State v. Hall*, 264 N.C. 559, 142 S.E.2d 177 (1965).

The provisions of the Turlington Act, Public Laws of 1923, did not contravene the provisions of this section. *State v. Godette*, 188 N.C. 497, 125 S.E. 24 (1924).

Sec. 21. *Inquiry into restraints on liberty.* Every person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the restraint if unlawful, and that remedy shall not be denied or delayed. The privilege of the writ of habeas corpus shall not be suspended.

Cross Reference.—See G.S. § 17-3 and note thereto.

Editor's Note.—The provisions of the

first sentence of this section are similar to those of Art. I, § 18, Const. 1868, and the provisions of the second sentence of this

section are similar to those of Art. I, § 21, Const. 1868. The case cited in the following annotation was decided under Art. I, § 18, Const. 1868.

Section Guarantees Writ of Habeas

Sec. 22. Modes of prosecution. Except in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment. But any person, when represented by counsel, may, under such regulations as the General Assembly shall prescribe, waive indictment in noncapital cases.

Cross Reference.—As to sufficiency of indictment, see note to § 23 of this article.

Editor's Note.—The provisions of this section are similar to those of Art. I, § 12, Const. 1868, as amended in 1950, and the cases in the following annotation were decided under that section.

For the history of the section, see *State v. Thomas*, 236 N.C. 454, 73 S.E.2d 283 (1952).

For note on jurisdiction of courts-martial to try servicemen for civilian offenses, see 48 N.C.L. Rev. 380 (1970).

Generally.—These principles are dear to every free man; they are his shield and buckler against wrong and oppression, and lie at the foundation of civil liberty; they are declared to be the rights of the citizens of North Carolina and ought to be vigilantly guarded. *State v. Moss*, 47 N.C. 66 (1854); *State v. Snipes*, 185 N.C. 743, 117 S.E. 500 (1923).

The word "indictment" means indictment by a grand jury as defined by the common law. *State v. Mitchell*, 202 N.C. 439, 163 S.E. 581 (1932).

The term "indictment" is used in this section to signify a written accusation of a crime drawn up by the public prosecuting attorney and submitted to the grand jury, and by them found and presented on oath or affirmation as a true bill. *State v. Thomas*, 236 N.C. 454, 73 S.E.2d 283 (1952).

Presentments.—The term "presentment" is used in this constitutional provision to denote an accusation made, *ex mero motu*, by a grand jury of an offense upon their own knowledge or observation, or upon information from others, without any bill of indictment having been submitted to them by the public prosecuting attorney. *State v. Thomas*, 236 N.C. 454, 73 S.E.2d 283 (1952).

Since the enactment of G.S. § 15-137 trials upon presentment have been abolished and a presentment amounts to nothing more than an instruction by the grand jury to the public prosecuting attorney to frame a bill of indictment. *State v. Thomas*, 236 N.C. 454, 73 S.E.2d 283 (1952).

Corpus.—See *State v. Lewis*, 274 N.C. 438, 164 S.E.2d 177 (1968).

For discussion of writ of habeas corpus, see *State v. Lewis*, 274 N.C. 438, 164 S.E.2d 177 (1968).

It is an essential of jurisdiction that a criminal offense should be sufficiently charged in a warrant or an indictment. *State v. Stokes*, 274 N.C. 409, 163 S.E.2d 770 (1968).

An indictment, whether at common law or under a statute, to be good must allege lucidly and accurately all the essential elements of the offense endeavored to be charged. The purpose of such constitutional provision is: (1) such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction or plea of *nolo contendere* or guilty, to pronounce sentence according to the rights of the case. *State v. Stokes*, 274 N.C. 409, 163 S.E.2d 770 (1968).

Valid Indictment Necessary. — This section requires a bill of indictment, unless waived, for all criminal actions originating in the superior court, and a valid bill is necessary to vest the court with authority to determine the question of guilt or innocence. *State v. Bisette*, 250 N.C. 514, 108 S.E.2d 858 (1959).

A valid indictment is a condition precedent to the jurisdiction of the superior court to determine the guilt or innocence of a defendant accused of any capital felony and to the authority of the court to render a valid judgment in the matter. *State v. Yoes*, 271 N.C. 616, 157 S.E.2d 386 (1967).

A valid indictment is a condition precedent to the jurisdiction of the superior court to determine the guilt or innocence of the defendant, and to give authority to the court to render a valid judgment. *State v. Ray*, 274 N.C. 556, 164 S.E.2d 457 (1968).

A valid indictment is necessary to vest the court with jurisdiction to determine the question of guilt or innocence. *State v. Stokes*, 274 N.C. 409, 163 S.E.2d 770 (1968).

A valid indictment returned by a legally constituted grand jury is an essential of

jurisdiction. *State v. Yoes*, 271 N.C. 616, 157 S.E.2d 386 (1967).

Effect of Invalid Indictment. — When the indictment charging defendant with the commission of crime is invalid, defendant's motion to dismiss the action for want of jurisdiction should be allowed. *State v. Beasley*, 208 N.C. 318, 180 S.E. 598 (1935).

This section sufficiently explains the function of the grand jury as a part of the court. It is competent to send to the grand jury as many bills of indictment as may be necessary to get before them necessary witnesses and evidence from which they may decide the propriety of submitting the accused to trial. *State v. Lewis*, 226 N.C. 249, 37 S.E.2d 691 (1946); *State v. Mercer*, 249 N.C. 371, 106 S.E.2d 866 (1959).

This section means action by the grand jury according to the practice at common law, and does not permit open hearings before the grand jury, and where the court sends for the grand jury and permits the solicitor to examine a State's witness in open court before the grand jury, after the grand jury had returned two identical bills of indictment against the defendant, submitted on successive days, "not a true bill," and thereafter the solicitor submits another identical bill to the grand jury which is returned "a true bill," the defendant's verified plea in abatement and motion to quash, made before pleading, should have been allowed, and upon appeal from the court's denial of the motion the judgment will be reversed, with leave to the solicitor to send another bill before a different grand jury, if so advised. *State v. Ledford*, 23 N.C. 724, 166 S.E. 917 (1932).

Necessity for Order for Grand Jury During Special Term.—Where defendant was tried at a special term of criminal court upon an indictment returned by a grand jury drawn for the special term, but there was no order by the Governor that a grand jury be drawn for such term, as provided by former G.S. § 7-78, defendant's motion in arrest of judgment, made the first time in the Supreme Court upon appeal, must be allowed, pursuant to this section. *State v. Baxter*, 208 N.C. 90, 179 S.E. 450 (1935). See *State v. Boykin*, 211 N.C. 407, 191 S.E. 18 (1937). See now G.S. § 7A-46.

An indictment returned by a grand jury not legally constituted is not a valid indictment. *State v. Yoes*, 271 N.C. 616, 157 S.E.2d 386 (1967); *State v. Ray*, 274 N.C. 556, 164 S.E.2d 457 (1968).

Capital Felonies. — A person charged with a capital felony can be prosecuted only on an indictment found by a grand

jury. *State v. Thomas*, 236 N.C. 454, 73 S.E.2d 283 (1952).

Noncapital Felonies and Misdemeanors. — A person charged with a noncapital felony or with a misdemeanor may be tried initially in the superior court only upon an indictment, except when represented by counsel he may be tried upon information signed by the solicitor when written waiver of indictment by defendant and his counsel appears on the face of the information as provided in G.S. §§ 15-140 and 15-140.1. *State v. Thomas*, 236 N.C. 454, 73 S.E.2d 283 (1952).

By virtue of this section an accused in a criminal proceeding, when represented by counsel, may, in all except capital cases, waive indictment under rules prescribed by the legislature. *State v. Harrington*, 5 N.C. App. 622, 169 S.E.2d 32 (1969).

The provisions of this section and § 24 of this article, when read together, empower the legislature to provide means other than indictments by grand juries for the trial of petty misdemeanors, with the right of appeal. *State v. Thomas*, 236 N.C. 454, 73 S.E.2d 283 (1952); *State v. Underwood*, 214 N.C. 68, 92 S.E.2d 461 (1956).

A person charged with the commission of a misdemeanor cannot be tried initially in the superior court except upon an indictment found by a grand jury, unless he waives indictment in accordance with regulations prescribed by the legislature. *State v. Norman*, 237 N.C. 205, 74 S.E.2d 602 (1953).

The constitutional requirement that criminal trials must be upon a bill of indictment is subject to two exceptions: (1) The legislature may provide means other than indictments by grand juries for the trial of petty misdemeanors; and (2) when represented by counsel, an accused may, in all except capital cases, waive indictment under rules prescribed by the legislature. *State v. Stevens*, 264 N.C. 364, 141 S.E.2d 521 (1965).

The legislature may or may not exercise its constitutional power to provide means of trial for petty misdemeanors other than upon a bill of indictment. *State v. Stevens*, 264 N.C. 364, 141 S.E.2d 521 (1965).

Assault with Deadly Weapon.—A justice of the peace had no jurisdiction of an assault with a deadly weapon except to bind the defendant over, and by the provisions of this section, the superior court could proceed to trial only upon indictment duly found and returned. *State v. Myrick*, 202 N.C. 688, 163 S.E. 803 (1932). See *State v. Clegg*, 214 N.C. 675, 200 S.E. 371 (1939).

Indictment on Appeal. — See *State v. Pulliam*, 184 N.C. 681, 114 S.E. 394 (1922).

See also *State v. Hyman*, 164 N.C. 411, 79 S.E. 284 (1913); *State v. Stevens*, 264 N.C. 364, 141 S.E.2d 521 (1965).

Until the legislature shall prescribe regulations governing the waiver of an indictment in a case heard in superior court on an appeal from an inferior court, an accused in such a case may not waive indictment and be tried upon an information. *State v. Harrington*, 5 N.C. App. 622, 169 S.E.2d 32 (1969).

Since the legislature has not chosen to prescribe any regulations for waiver of indictment in cases heard in superior court on an appeal from an inferior court, defendant in such a case can only be lawfully tried in superior court either upon the original warrant or upon an indictment. *State v. Harrington*, 5 N.C. App. 622, 169 S.E.2d 32 (1969).

Trial in Superior Court upon Original Accusation.—Where the General Assembly declares an offense below the grade of felony to be a petty misdemeanor and provides for prosecution of such offense in an inferior court upon accusation other than indictment, and confers upon such inferior court final jurisdiction of such prosecutions subject to the right of appeal to the superior court, the defendant on appeal from conviction in the inferior court may be tried in the superior court upon the

original accusation without an indictment; but when there has been no trial in the inferior court and the prosecution has been merely transferred to the superior court upon defendant's demand for jury trial, trial in the superior court upon the original warrant is a nullity, and a statute providing for such trial is unconstitutional. *State v. Thomas*, 236 N.C. 454, 73 S.E.2d 283 (1952).

The superior court has no jurisdiction to try an accused for a specific misdemeanor on the warrant of an inferior court unless he is first tried and convicted for such misdemeanor in the inferior court and appeals to the superior court from the sentence pronounced against him by the inferior court on his conviction for such misdemeanor. *State v. Hall*, 240 N.C. 109, 81 S.E.2d 189 (1954); *State v. Morgan*, 246 N.C. 596, 99 S.E.2d 764 (1957); *State v. Cofield*, 247 N.C. 185, 100 S.E.2d 355 (1957).

A defendant convicted in a recorder's court having final jurisdiction of the offense charged could be tried in the superior court on appeal upon the original warrant without an indictment. *State v. Doughtie*, 238 N.C. 228, 77 S.E.2d 642 (1953).

Enjoining Illegal Practices under Act Regulating Pharmacy.—See note to G.S. § 90-85.1.

Sec. 23. Rights of accused. In all criminal prosecutions, every person charged with crime has the right to be informed of the accusation and to confront the accusers and witnesses with other testimony, and to have counsel for defense, and not be compelled to give self-incriminating evidence, or to pay costs, jail fees, or necessary witness fees of the defense, unless found guilty.

- I. General Consideration.
- II. Right to Be Informed of Accusation.
- III. Right of Confrontation.
- IV. Right to Counsel.
- V. Self-Incrimination.
- VI. Witness Fees, Costs, etc.

I. GENERAL CONSIDERATION.

Editor's Note.—The provisions of this section are similar to those of Art. I, § 11, Const. 1868, as amended in 1946, and the cases in the following annotation were decided under that section.

When Motion for Continuance Presents Question of Law. — When a motion for continuance, in a criminal case, is based on a right guaranteed by the federal and State Constitutions, the Fourteenth Amendment, U.S. Constitution, this section and § 19 of this article, the question presented is one of law and not of discretion, and the decision of the court below is reviewable. *State v. Farrell*, 223 N.C. 321, 26 S.E.2d 322 (1943); *State v. Lane*, 258 N.C. 349,

128 S.E.2d 389 (1962); *State v. Atkinson*, 7 N.C. App. 355, 172 S.E.2d 249 (1970).

A motion for continuance is addressed to the sound discretion of the trial judge and his ruling thereon is not subject to review on appeal, except in a case of manifest abuse; however, when the motion is based on a right guaranteed by the federal and State Constitutions, the question presented is one of law and the order of the court is reviewable. *State v. Phillip*, 261 N.C. 263, 134 S.E.2d 386 (1964).

Private Counsel May Assist Solicitor in Trial of Case.—The trial court has discretionary power to allow private counsel to assist the solicitor in the trial of a case, it being the duty of the court to permit only such assistance as fairness and justice may require, and such power does not impinge the provisions of this section of the Constitution. *State v. Carden*, 209 N.C. 404, 183 S.E. 898 (1936).

Special Verdict.—In a prosecution under G.S. § 49-2 a verdict upon the issues of

paternity and nonsupport, if resolved in favor of the State, is sufficient to support a judgment against defendant without a general verdict by the jury of guilty. This does not contravene the provisions of this section and § 24 of this article, requiring trial and verdict by jury in criminal cases. *State v. Ellis*, 262 N.C. 446, 137 S.E.2d 840 (1964).

II. RIGHT TO BE INFORMED OF ACCUSATION.

Purpose.—The purpose of constitutional provisions guaranteeing the right to be informed of the accusation is: (1) such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial; and (4) to enable the court, on conviction or plea of *nolo contendere* or guilty, to pronounce sentence according to the rights of the case. *State v. Barnes*, 253 N.C. 711, 117 S.E.2d 849 (1961).

Section Embodies Common-Law Rule as to Indictment or Warrant.—This constitutional guaranty is, in essence, an embodiment of the common-law rule requiring the charge against the accused to be set out in the indictment or warrant with sufficient certainty to identify the offense with which he is sought to be charged, protect him from being twice put in jeopardy for the same offense, enable him to prepare for trial, and enable the court to proceed to judgment according to law in case of conviction. *State v. Jenkins*, 238 N.C. 396, 77 S.E.2d 796 (1953); *State v. Nugent*, 243 N.C. 100, 89 S.E.2d 781 (1955).

As to necessity for indictment, see § 22 of this article, and the note thereto.

It is an essential of jurisdiction that a criminal offense shall be sufficiently charged in a warrant or an indictment. *State v. Barnes*, 253 N.C. 711, 117 S.E.2d 849 (1961).

But Special Form or Particular Words Are Not Required.—This section of the Constitution does not require that the accused be informed of the charge against him in any special form or particular words, except it must be by presentment or indictment. *State v. Gibson*, 169 N.C. 318, 85 S.E. 7 (1915); *State v. Carpenter*, 173 N.C. 767, 92 S.E. 373 (1917).

A bill of indictment that charges "in a plain, intelligible and explicit manner," as provided in G.S. § 15-153, the criminal offense the accused is put to answer affords the protection guaranteed by this section and § 22 of this article. *State v. Helms*, 247 N.C. 740, 102 S.E.2d 241 (1958).

Indictment Must Allege All Essential Elements of Offense.—An indictment, whether at common law or under a statute, to be good must allege lucidly and accurately all the essential elements of the offense endeavored to be charged. *State v. Barnes*, 253 N.C. 711, 117 S.E.2d 849 (1961).

And Be Sufficient to Protect Defendant against Subsequent Prosecution for Same Offense.—The allegations in a bill of indictment must particularize the crime charged and be sufficiently explicit to protect the defendant against a subsequent prosecution for the same offense. *State v. Barnes*, 253 N.C. 711, 117 S.E.2d 849 (1961).

Sufficiency of Charging Offense in Words of Statute.—While it is a general rule prevailing in this State that an indictment for a statutory offense is sufficient if the offense be charged in the words of the statute, the rule is inapplicable where the words of the statute do not in themselves inform the accused of the specific offense of which he is accused so as to enable him to prepare his defense or plead his conviction or acquittal as a bar to further prosecution for the same offense, as where the statute characterizes the offense in mere general or generic terms, or does not sufficiently define the crime or set forth all its essential elements. In such situation the statutory words must be supplemented by other allegations which so plainly, intelligibly and explicitly set forth every essential element of the offense as to leave no doubt in the mind of the accused and the court as to the offense intended to be charged. *State v. Barnes*, 253 N.C. 711, 117 S.E.2d 849 (1961).

Statute which establishes a form for a bill of indictment for perjury, and enacts in express terms that this form shall be sufficient, was sufficient to apprise the defendant with reasonable certainty of the nature of the crime of which he stands charged. *State v. Harris*, 145 N.C. 456, 59 S.E. 115 (1907).

A warrant or indictment charging dissemination or possession of obscenity in violation of G.S. § 14-189.1 should at least so describe the alleged obscene matter or pictures as to render them capable of identification. *State v. Barnes*, 253 N.C. 711, 117 S.E.2d 849 (1961).

An indictment which failed to show the causal relation between the alleged false pretense and the deceit, was held not to inform defendant of the crime charged against him. It is his constitutional right to be so informed. *State v. Whedbee*, 152 N.C. 770, 67 S.E. 60, 27 L.R.A. (n.s.) 363 (1910).

Indictment for Larceny and Receiving Stolen Goods.—The defendant has a constitutional right to have a bill of indictment for larceny and receiving stolen goods state the kind of property he is alleged to have taken or received, so that he can know precisely what he is called upon to meet, in order to have a fair and reasonable opportunity to prepare his defense, and so that, in the event of a conviction, the record may show with accuracy the exact offense of which he was convicted. The use of the embrative word "meat" in the bill of indictment deprived the defendant of this substantial constitutional right. *State v. Nugent*, 243 N.C. 100, 89 S.E.2d 781 (1955).

Testing Sufficiency of Warrant or Indictment.—A motion to quash is a proper method of testing the sufficiency of a warrant or an indictment to charge a criminal offense. *State v. Barnes*, 253 N.C. 711, 117 S.E.2d 849 (1961).

Charge to Jury Held to Violate Section.—A charge to the jury which virtually puts the defendant upon trial for an additional offense to that named in the bill, in this case, conspiring with others than those alleged, violates the provisions of this section that "in all criminal prosecutions every man has the right to be informed of the accusation against him." *State v. Mickey*, 207 N.C. 608, 178 S.E. 220 (1935).

Judgment Revoking Suspension of Sentence.—Where a defendant convicted of a criminal offense has had sentence suspended upon condition that he appear at certain times in court and show good behavior, it is required that a judgment rendered at a later time find the facts upon which a sentence has been imposed and specify the findings of a certain criminal offense the defendant is found to have committed, in order to show that the defendant had been informed of the offense before sentence. *State v. Gooding*, 194 N.C. 271, 139 S.E. 436 (1927).

III. RIGHT OF CONFRONTATION.

Editor's Note.—For article discussing the limits to confrontation, see 15 N.C.L. Rev. 229. For comment on right of confrontation, see 28 N.C.L. Rev. 205. For note on right of confrontation at presentence investigation, see 41 N.C.L. Rev. 260 (1963). For comment on the Sixth Amendment right of confrontation made obligatory in State prosecutions, see 44 N.C.L. Rev. 173 (1965).

Definition.—The word "confront" secures to the accused the right to have his witnesses in court, and to examine them in his behalf. It further secures to the accused a

fair opportunity to prepare and present his defense, which right must be afforded him not only in form but in substance. *State v. Hackney*, 240 N.C. 230, 81 S.E.2d 778 (1954); *State v. Graves*, 251 N.C. 550, 112 S.E.2d 85 (1960).

In *State v. Hightower*, 187 N.C. 300, 121 S.E. 616 (1924), it was said: "In all criminal prosecutions the defendant is clothed with a constitutional right of confrontation, and this may not be taken away any more by denying him the right to cross-examine the State's witnesses than by refusing him the right to confront his accusers and witnesses with other testimony. Constitution, Art. I, § 11 [this section]. 'We take it that the word confront does not simply secure to the accused the privilege of examining witnesses in his behalf, but is an affirmation of the rule of the common law that in trials by jury the witness must be present before the jury and accused, so that he may be confronted; that is, put face to face'—Pearson, C.J., in *State v. Thomas*, 64 N.C. 74 (1870). And this, of course, includes the right of cross-examination." *State v. Moss*, 47 N.C. 66 (1854); *State v. Harris*, 181 N.C. 600, 107 S.E. 466 (1921); *State v. Maynard*, 184 N.C. 653, 113 S.E. 682 (1922); *State v. Snipes*, 185 N.C. 743, 117 S.E. 500 (1923); *State v. Hartsfield*, 188 N.C. 357, 124 S.E. 629 (1924).

In *State v. Thomas*, 64 N.C. 74 (1870), it is said that the word "confront" as used in this section does not simply secure to the accused the privilege of examining witnesses in his behalf, but is an affirmation of the common-law rule that in trials by jury the witness must be present before the jury and the accused, so that he may be confronted, that is put face to face. It extends also to the right to require the witnesses to be placed under oath, subject to the test of a competent cross-examination. *State v. Dixon*, 185 N.C. 727, 119 S.E. 170 (1923). See also *State v. Breece*, 206 N.C. 92, 173 S.E. 9 (1934).

Right Includes Opportunity to Face Accusers and Witnesses with Other Testimony.—Defendants have a constitutional right of confrontation, which cannot lawfully be taken from them, and this includes the right of a fair opportunity to face "the accusers and witnesses with other testimony." *State v. Garner*, 203 N.C. 361, 166 S.E. 180 (1932).

And to Prepare and Present Defense.—The constitutional right of a defendant in a criminal prosecution to confront his accusers and adverse witnesses with other testimony, as provided by this section, includes the right to a fair opportunity to

prepare and present his defenses, which right must be accorded him not only in form, but in substance as well. *State v. Whitfield*, 206 N.C. 696, 175 S.E. 93 (1934); *State v. Utley*, 223 N.C. 39, 25 S.E.2d 195 (1943); *State v. Gibson*, 229 N.C. 497, 50 S.E.2d 520 (1948), discussed in 27 N.C.L. Rev. 544; *State v. Speller*, 230 N.C. 345, 53 S.E.2d 294 (1949); *State v. Whisnant*, 271 N.C. 736, 157 S.E.2d 545 (1967).

The right of confrontation carries with it not only the right to face one's accuser and witnesses with other testimony, but also the opportunity fairly to present one's defense. *State v. Lane*, 258 N.C. 349, 128 S.E.2d 389 (1962).

Due process requires that every defendant be allowed a reasonable time and opportunity to investigate and produce competent evidence, if he can, in defense of the crime with which he stands charged and to confront his accusers with other testimony. *State v. Baldwin*, 276 N.C. 690, 174 S.E.2d 526 (1970).

Where defendant changed his plea from guilty to not guilty and requested the court to allow him time to obtain witnesses from other states, it was error for the court to force him to trial on the succeeding day, since, under the facts of the case, defendant was not given time to prepare for trial. *State v. Whisnant*, 271 N.C. 736, 157 S.E.2d 545 (1967).

It Does Not Apply to Civil Actions. — The right accorded defendant in a criminal prosecution to confront the witnesses against him does not apply to civil actions. *Chesson v. Kieckhefer Container Co.*, 223 N.C. 378, 26 S.E.2d 904 (1943).

Waiver of Right. — The accused has the right to insist upon the production of his accusers but this is a right which may be and is waived by a failure to assert it in proper time. The right must be insisted upon in express terms and a general objection to the evidence is not sufficient. *State v. Mitchell*, 119 N.C. 784, 25 S.E. 783, 1020 (1896).

When Right Not Denied by Refusing Motion to Continue. — There is no denial of prisoner's right to confrontation by the refusal of a motion to continue, on the ground of the absence of a material, expert, fingerprint witness, it appearing that the State's solicitor agreed that he would not, and did not offer evidence as to fingerprints. *State v. Rising*, 223 N.C. 747, 28 S.E.2d 221 (1943).

The denial of a continuance is not prejudicial error where the record fails to show that it would have enabled defendant and his counsel to obtain additional evidence or otherwise present a stronger defense.

State v. Gibson, 229 N.C. 497, 50 S.E.2d 520 (1948).

The right of a defendant to confront his accusers includes the right to cross-examine them on any subject touched on in their examination-in-chief, and a witness testifying to facts incriminating defendant on his examination-in-chief may not deprive defendant of his right to cross-examine him on the ground that answers to questions asked on cross-examination might tend to incriminate the witness. *State v. Perry*, 210 N.C. 796, 188 S.E. 639 (1936).

The right to confront affirms the common-law rule that in criminal trials by jury the witness must be present and subject to cross-examination under oath. *State v. Bumper*, 275 N.C. 670, 170 S.E.2d 457 (1969).

Right to Cross-Examine Is Absolute. — The defendant is entitled to a full and fair cross-examination upon the subject of the witness' examination-in-chief, and this is an absolute right rather than a privilege. *State v. Bumper*, 275 N.C. 670, 170 S.E.2d 457 (1969).

But Trial Judge May Limit Repetitious and Argumentative Cross-Examination for Purpose of Impeachment. — When cross-examination is made for the purpose of impeaching the credibility of a witness, the method and duration of the cross-examination for these purposes rest largely in the discretion of the trial court, and the trial court may properly exclude such cross-examination when it becomes merely repetitious or argumentative. *State v. Bumper*, 275 N.C. 670, 170 S.E.2d 457 (1969).

A rule allowing the trial judge to exercise his discretion to limit cross-examination for the purpose of impeachment when it becomes repetitious or argumentative does not violate any provision of the United States Constitution. The orderly administration of justice in the courts would be quickly destroyed should the trial judge be forced to allow counsel to cross-examine on such matters ad infinitum. It is obvious that the rule is for a legitimate and fair State purpose and does not contravene due process. *State v. Bumper*, 275 N.C. 670, 170 S.E.2d 457 (1969).

Where Witness Is Withdrawn Before Cross-Examination. — Where, during the testimony of a witness, the prosecution asks for and receives permission to withdraw the witness to be recalled later, but closes its case without recalling the witness, defendant, if he wishes to assert his right to cross-examine the witness, must request the court to have the witness return to the stand, and when he fails to do so, he may

not assert that he was deprived of his constitutional right of confrontation. *State v. Gattison*, 266 N.C. 669, 146 S.E.2d 825 (1966).

No Right to Inspect Files of State Bureau of Investigation.—Where there is no contention that anything in the files of the State Bureau of Investigation was admitted in evidence and the record shows that no member of the Bureau testified during the trial, defendants' contention that they were entitled to an inspection of the files of the Bureau in regard to its investigation of the case is untenable and denial of their petition for such inspection does not violate any of their rights under this section of the Constitution of North Carolina, or under the Fifth, Sixth, Seventh, and Fourteenth Amendments to the federal Constitution. *State v. Goldberg*, 261 N.C. 181, 134 S.E.2d 334 (1964).

Presence of Living Witnesses Not Invariably Required.—The right guaranteed by this section does not mean that never under any circumstances shall a criminal charge be prosecuted except by the presence of living witnesses. *State v. Dowdy*, 145 N.C. 432, 58 S.E. 1002 (1907).

Depositions.—Depositions taken in the absence of a criminal cannot be read against him. *State v. Webb*, 2 N.C. 103 (1794).

Introduction of Transcribed Testimony Given at Former Trial of Same Offense.—The constitutional right of confrontation is not denied an accused by the introduction at a subsequent trial of the transcribed testimony given at a former trial of the same action by a witness who has since died, become insane, left the State permanently or for an indefinite absence, become incapacitated to testify in court as a result of a permanent or indefinite illness, or absented himself by procurement of, or connivance with, the accused. The accuracy of the transcription must be attested and it must appear that the defendant had a reasonable opportunity to cross-examine the witness. *State v. Prince*, 270 N.C. 769, 154 S.E.2d 897 (1967).

Where a trial was terminated prior to verdict at the instance of defendant to obtain other counsel the testimony of a witness at such trial, with full cross-examination taken in open court and properly attested, was properly admitted in evidence at the subsequent trial when it appeared that the witness was then on military duty outside the boundaries of the United States, and the admission of such testimony did not violate defendant's right of confrontation. *State v. Prince*, 270 N.C. 769, 154 S.E.2d 897 (1967).

Dying Declarations.—The principle upon which dying declarations may be received in evidence in criminal cases is not in violation of the defendant's constitutional right to confront his accusers, as they have been admitted from necessity. *State v. Williams*, 185 N.C. 643, 116 S.E. 570 (1923).

Entries Upon Books in Course of Business.—Under this construction it is held that entries in the course of business, upon the books of a railroad company by one at the time an agent of the company, and still living, but absent from the State, are not competent evidence of the facts therein set forth, upon the trial of a third person for crime. *State v. Thomas*, 64 N.C. 74 (1870).

Admission of Record Showing Guilty Plea by Codefendant.—In a prosecution for aiding and abetting, the admission of the record showing that the codefendants had pleaded guilty to the offense deprived the defendant of her right of confrontation. *State v. Jackson*, 270 N.C. 773, 155 S.E.2d 236 (1967).

Duly Authenticated Copy of Record.—While this section gives to the accused the right to confront his accusers, such does not apply when the facts, from their very nature, can only be proved by a duly authenticated copy of a record. *State v. Dowdy*, 145 N.C. 432, 58 S.E. 1002 (1907).

Prisoner Need Not Accompany Jury to View Scene of Crime.—By construing this section, which gives the accused the right to be confronted by witnesses, with the right to be present at the trial, the conclusion reached in this State is that the prisoner does not have to accompany the jury when it views the scene of the crime. Apparently the right to accompany the jury has never been raised in this State. 12 N.C.L. Rev. 268.

Findings in a proceeding under the Post Conviction Hearing Act, disclosing that petitioners, although jointly tried, were not allowed to communicate with one another prior to trial, and that their attempts to contact witnesses and friends were unsuccessful, did not support the lower court's conclusion of law that petitioners had not been denied any rights guaranteed to them by this section and § 19 of this article and the Fourteenth Amendment to the Constitution of the United States. *State v. Wheeler*, 249 N.C. 187, 105 S.E.2d 615 (1958).

IV. RIGHT TO COUNSEL.

Cross References.—See G.S. §§ 7A-450 to 7A-459, 7A-465 to 7A-470, and Appx. VI-A, Regulations Relating to the Appointment of Counsel for Indigent Defendants in Certain Criminal Cases, and the notes thereto.

Editor's Note.—For note on the right to counsel, see 32 N.C.L. Rev. 331 (1954). For comment on right to counsel, see 44 N.C.L. Rev. 161 (1965). For case law survey as to right to counsel, see 45 N.C.L. Rev. 875 (1967).

A defendant has a constitutional right in all criminal cases to be represented by counsel selected and employed by him. *State v. Morris*, 275 N.C. 50, 165 S.E.2d 245 (1969).

A defendant has the constitutional right to be represented by counsel whom he has selected and employed, and in prosecutions for capital felonies the court has an inescapable duty to assign counsel to a person unable to employ one. *State v. Gibson*, 229 N.C. 497, 50 S.E.2d 520 (1948).

Prompt appointment of counsel in a capital case is mandatory and required by this section. *State v. Pearce*, 266 N.C. 234, 145 S.E.2d 918 (1966).

Statute Making Appointment of Counsel for Indigent Discretionary Is Unconstitutional.—Former § 15-4.1, insofar as it purported to leave to the discretion of the trial judge the appointment of counsel for indigent defendants charged with serious offenses, was unconstitutional. A serious offense is one for which the authorized punishment exceeds six months' imprisonment and a \$500 fine. The cases of *State v. Hayes*, 261 N.C. 648, 135 S.E.2d 653 (1964) and *State v. Sherron*, 268 N.C. 694, 151 S.E.2d 599 (1966) are no longer authoritative. *State v. Morris*, 275 N.C. 50, 165 S.E.2d 245 (1969).

Waiver of Right. — The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record. *State v. Morris*, 275 N.C. 50, 165 S.E.2d 245 (1969).

The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver. *State v. Morris*, 275 N.C. 50, 165 S.E.2d 245 (1969).

Determination of Question of Indigency.—Where defendant is charged with a serious crime, it is important for the trial judge to determine in the first instance the

question of indigency and for the record to show whether lack of counsel results from indigency or choice. *State v. Morris*, 275 N.C. 50, 165 S.E.2d 245 (1969).

Presence of Counsel at Preliminary Hearing. — The preliminary hearing was not such a critical stage of the proceeding as to require the presence of counsel, and the failure to supply counsel for such preliminary hearing was not a deprivation of any constitutional right. *State v. Miller*, 271 N.C. 611, 157 S.E.2d 211 (1967).

Denial of Opportunity to Consult with Counsel, Family or Friends. — Where defendant was held in custody nearly ten days without the opportunity to consult with counsel, or confer with his own family and friends, or have his interests protected, and was questioned during this entire period intermittently, denied sleep, and removed from one place to another, all the time being denied the opportunity to consult with counsel or friends, or appear before a committing magistrate, and other requirements such as being fully advised of his constitutional rights were not properly afforded defendant, it was held that his rights under this section were directly violated. *Pugh v. North Carolina*, 238 F. Supp. 721 (E.D.N.C. 1965).

Facts Showing Denial of Right to Be Properly Represented by Counsel.—After the convening of the term the trial court ordered a special venire from another county to try a negro charged with rape. Counsel for defendant challenged the array on the ground that persons of defendant's race had been excluded from the jury list solely because of their race, and the court refused the request of counsel for time to investigate and secure evidence in support of such challenge to the array, but counsel obtained evidence from members of the special venire and bystanders of the courtroom tending to sustain the challenge. It was held that as it appeared that defendant was prejudiced by denial of reasonable opportunity to procure evidence in support of his challenge to the array, a new trial was awarded for the denial of defendant's constitutional right to be properly represented by counsel. *State v. Speller*, 230 N.C. 345, 53 S.E.2d 294 (1949).

V. SELF-INCRIMINATION.

Cross Reference.—As to witness testifying to any unlawful gaming done by himself or others, see G.S. § 8-55 and note thereto.

Editor's Note. — For note on self-incrimination and the use of chemical tests to determine intoxication, see 30 N.C.L. Rev. 302 (1952). For note on self-incrimina-

tion and the possibility of subjecting witnesses to punitive damages, see 42 N.C.L. Rev. 918 (1964). For case law survey as to coerced confessions, see 45 N.C.L. Rev. 869 (1967).

Scope of Protection.—The fair interpretation of the clause that the defendant “shall not be compelled to give evidence against himself” seems to be to secure one who is or may be accused of crime from making any compulsory revelations which may be given in evidence against him on his trial for the offense. *LaFontaine v. Southern Underwriters Ass’n*, 83 N.C. 132 (1880).

This immunity extends, not only to one who actually testifies as a witness, but to the defendant in the trial, even though he decline to testify as a witness in his own behalf. *State v. Hollingsworth*, 191 N.C. 595, 132 S.E. 667 (1926).

The scope of the privilege against self-incrimination, in history and in principle, includes only the process of testifying by word of mouth or in writing, i.e., the process of disclosure by utterance. It has no application to such physical evidential circumstances as may exist on the accused’s body or about his person. *State v. Strickland*, 276 N.C. 253, 173 S.E.2d 129 (1970).

The constitutional inhibition against self-incrimination is directed against compulsion, and not against voluntary admissions, confessions, or testimony freely given on the trial. Such statements, confessions, and testimony voluntarily given on a former trial are received against the accused as his admissions. *State v. Farrell*, 223 N.C. 804, 28 S.E.2d 560 (1944); *State v. Sheffield*, 251 N.C. 309, 111 S.E.2d 195 (1959).

The privilege against self-incrimination is one against being compelled to testify. It furnishes no protection against the use of testimony which was voluntarily given. *State v. Floyd*, 246 N.C. 434, 98 S.E.2d 478 (1957).

Liberal Construction. — In *Smith v. Smith*, 116 N.C. 386, 21 S.E. 196 (1895), it was held that the true intent and meaning of this article is that a witness shall not be compelled to answer any question, the answer to which would disclose a fact which forms an essential link in the chain of testimony which would be sufficient to convict him of a crime. And Chief Justice Faircloth, delivering the opinion, said: “We think the provision of our Constitution ought to be liberally construed to preserve personal rights and protect the citizen against self-incriminating evidence.” *State v. Medley*, 178 N.C. 710, 100 S.E. 591 (1919).

Guaranty Extends to any Proceedings Sanctioned by Law. — The constitutional guaranties against self-incrimination are to be liberally construed and they apply not only to criminal prosecutions but to any proceedings sanctioned by law, including examinations before trial. *Allred v. Graves*, 261 N.C. 31, 134 S.E.2d 186 (1964).

Truth or Falsity of Statements. — The constitutional privilege against self-incrimination, however, bars the introduction of all statements falling within its scope without regard for their truth or falsity. *State v. Rogers*, 233 N.C. 390, 64 S.E.2d 572 (1951).

Waiver of Privilege. — The defendant waives his constitutional privilege not to answer questions tending to incriminate himself when he voluntarily testifies in his own behalf. *State v. Allen*, 107 N.C. 805, 11 S.E. 1016 (1890).

A person may waive his right to be free from unreasonable searches and seizures. A consent to search will constitute such waiver only if it clearly appears that the person voluntarily consented, or permitted, or expressly invited and agreed to the search. Where the person voluntarily consents to the search, he cannot be heard to complain that his constitutional and statutory rights were violated. *State v. Hamilton*, 264 N.C. 277, 141 S.E.2d 506 (1965).

Defendant Voluntarily Taking Stand. — Whenever the defendant in a criminal action voluntarily testifies in his own defense he assumes the position of a witness and subjects himself to all the disadvantages of that position. In doing so he acknowledges the right of the prosecution to test his credibility and he waives his constitutional privilege not to answer questions which tend to incriminate him or to prove the specific offense with which he is charged. *State v. O’Neal*, 187 N.C. 22, 120 S.E. 817 (1924).

See G.S. § 8-54 and note thereto.

Accomplice Cannot Refuse to Answer on Cross-Examination after Incriminating Defendant. — An accomplice may not testify on direct examination to facts tending to incriminate defendant and at the same time refuse to answer questions on cross-examination relating to matters embraced in his examination-in-chief, and where he refuses to answer relevant questions on cross-examination on the ground that his answers might tend to incriminate him, it is error for the court to refuse defendant’s motion that his testimony-in-chief be stricken from the record, the refusal to answer the questions on cross-ex-

amination rendering the testimony-in-chief incompetent. *State v. Perry*, 210 N.C. 796, 188 S.E. 639 (1936).

Questions Subjecting Defendant to Punitive Damages. — This provision protects defendants from being required to answer questions, on an order of examination, which will necessarily tend to subject them to a verdict or an award of punitive damages, and to an execution against the person, the effect of which would be to deprive them entirely of their homestead exemption and of any personal property exemption over fifty dollars. *Allred v. Graves*, 261 N.C. 31, 134 S.E.2d 186 (1964).

Where Right to Punitive Damages Relinquished. — In an action for malicious assault, if plaintiff seeks merely compensatory damages and relinquishes all claim to punish defendants by punitive damages and to arrest them by virtue of the provisions of G.S. § 1-410 (1) and to issue an execution against their persons by virtue of the provisions of § 1-311, defendants' claim of privilege against self-incrimination does not apply. *Allred v. Graves*, 261 N.C. 31, 134 S.E.2d 186 (1964).

Confessions.—In this jurisdiction, when a purported confession of a defendant is offered into evidence and defendant objects, the trial judge, in the absence of the jury, hears evidence of both the State and the defendant upon the question of the voluntariness of defendant's statements. The general rule is that after such inquiry, when there is conflicting evidence offered at the voir dire hearing, the trial judge shall make findings of fact to show the bases of his ruling on the admissibility of the evidence offered. *State v. Moore*, 275 N.C. 141, 166 S.E.2d 53 (1969).

In-Custody Statements. — Every statement made by a person in custody as a result of an illegal arrest is not ipso facto involuntary and inadmissible, but the facts and circumstances surrounding such arrest and the in-custody statement should be considered in determining whether the statement is voluntary and admissible. Voluntariness remains as the test of admissibility. *State v. Moore*, 275 N.C. 141, 166 S.E.2d 53 (1969).

In-custody statements attributed to a defendant, when offered by the State and objected to by the defendant "are inadmissible for any purpose unless, after a voir dire hearing in the absence of the jury, the court, based upon sufficient evidence" makes factual findings that such statements were voluntarily and understandingly made by the defendant after he had been fully advised as to his constitutional

rights. *State v. Strickland*, 276 N.C. 253, 173 S.E.2d 129 (1970).

Silence in Face of Accusation of Guilt Made by Police.—Defendant's silence in face of an accusation of guilt cannot be competent as an implied admission when the accusation is made during interrogation of defendant by officers of the law. To compel defendant to reply to an accusation under such circumstances on pain of having his silence considered against him would amount to an infringement of his constitutional right not to be compelled to incriminate himself. *State v. Fuller*, 270 N.C. 710, 155 S.E.2d 286 (1967).

Warning Given by Arresting Officers.—Where police officers arresting a person for murder told him that anything he said, or did not say, in response to statements made by an eyewitness could be used for or against him their warning violated the provision of this section which requires that no person charged with crime shall be compelled to give self-incriminating evidence. *State v. Fuller*, 270 N.C. 710, 155 S.E.2d 286 (1967).

Evidential Circumstances on Accused's Body, etc. — The scope of the privilege against self-incrimination includes only the process of testifying by word of mouth or in writing. It has no application to such physical, evidential circumstances as may exist on the accused's body or about his person. *State v. Rogers*, 233 N.C. 390, 64 S.E.2d 572 (1951); *State v. Paschal*, 253 N.C. 795, 117 S.E.2d 749 (1961).

Upon the trial of the defendant for violating the prohibition law the introduction in evidence of testimony of the officer making the arrest that he found a half-gallon jar of liquor on the person of the defendant is competent, and is not in violation of the constitutional provision that a defendant may not be compelled to give evidence against himself, the provision not applying to physical facts or conditions. *State v. Hickey*, 198 N.C. 45, 150 S.E. 615 (1929).

The constitutional guarantee that a defendant shall not be compelled to testify against himself, as provided by this section, does not preclude testimony by a witness as to marks on defendant's body tending to identify him as the perpetrator of the crime. *State v. Riddle*, 205 N.C. 591, 172 S.E. 400 (1934); *State v. Floyd*, 246 N.C. 434, 98 S.E.2d 478 (1957).

The admission of incriminating testimony of defendant's physical condition by witnesses who examined her without objection does not violate defendant's constitutional right not to be compelled to give

evidence against herself, as provided in this section. *State v. Eccles*, 205 N.C. 825, 172 S.E. 415 (1934).

Witnesses for the State had testified as to a small scar near the culprit's left eye, a small mole on his left ear, and gold fillings in his teeth. Upon return of the jury into the courtroom in disagreement as to defendant's identity as the culprit, the court did not commit prejudicial error in permitting a juror, with defendant's consent, to examine defendant's body for the distinguishing marks. *State v. Floyd*, 246 N.C. 434, 98 S.E.2d 478 (1957).

Examination of Blood of Accused. — Where defendant pleaded insanity at the time of the homicide due to the continued use of liquor and opiates, and the record failed to show any compulsion on the part of the officers in obtaining specimens of defendant's blood and urine in order to ascertain the presence or absence of alcohol or morphine in his system, it was held that defendant's contention that the obtaining of the specimens compelled him to give evidence against himself, in violation of this section, was untenable. *State v. Cash*, 219 N.C. 818, 15 S.E.2d 277 (1941).

Expert testimony as to the results of test of defendant's blood is admissible on the trial of a charge of driving a motor vehicle upon the public highways within the State while under the influence of intoxicating beverages. *State v. Willard*, 241 N.C. 259, 84 S.E.2d 899 (1954).

Refusal to Submit to Chemical Test of Blood. — The admission of evidence of a defendant's refusal to submit to a chemical test designed to measure the alcoholic content of his blood does not violate his constitutional right against self-incrimination. *State v. Strickland*, 276 N.C. 253, 173 S.E.2d 129 (1970).

Examination of Clothing. — No constitutional rights were invaded when an officer required defendant accused of rape to surrender for examination and analysis the clothing worn by him at the time the crime was alleged to have been committed. *State v. Gaskill*, 256 N.C. 652, 124 S.E.2d 873 (1962); *State v. Colson*, 274 N.C. 295, 163 S.E.2d 376 (1968).

Evidence of Footprints. — The constitutional privilege against self-incrimination is not violated by the introduction of evidence of footprints to identify the accused, even where these are obtained by coercion. *State v. Rogers*, 233 N.C. 390, 64 S.E.2d 572 (1951).

Photographs. — The admission of the photograph of a lineup including the defendant was not violative of his rights under this section or § 19 of this article,

where the photograph was properly identified and entered into evidence for the purpose of illustrating the testimony of a witness, and, although the defendant objected to the questions identifying the picture, he did not ask that its admission be restricted. *State v. McKissick*, 271 N.C. 500, 157 S.E.2d 112 (1967).

Talking Motion Pictures. — Talking motion pictures of an accused in a criminal action are not per se testimonial in nature, and, where they are properly used to illustrate competent and relevant testimony of a witness, their use does not violate accused's privilege against self-incrimination. *State v. Strickland*, 276 N.C. 253, 173 S.E.2d 129 (1970).

However, the State cannot introduce substantive evidence or add to the testimony of a witness under the guise of using a moving picture to illustrate the testimony of the witness. Nevertheless, if the testimony of a witness is generally consistent with the illustrative evidence, a slight variation only affects the credibility of the evidence. *State v. Strickland*, 276 N.C. 253, 173 S.E.2d 129 (1970).

When a sound motion picture contains incriminating statements by the defendant made from his knowledge of the offense upon defendant's objection, the judge must conduct a voir dire to determine the admissibility of the in-custody statements or admissions contained in the sound picture. *State v. Strickland*, 276 N.C. 253, 173 S.E.2d 129 (1970).

Demonstration of Act of Killing.—Upon trial for murder in the first degree when there is other circumstantial evidence of the prisoner's guilt, it is not duress to require the prisoner to place himself in such position as to show he could have fired the fatal shot from a window and killed the deceased, as this is not considered as making a person furnish evidence against himself, it being dependent upon physical facts and conditions and not upon confessions or statements of the prisoner. *State v. Thompson*, 161 N.C. 238, 76 S.E. 249 (1912).

Testimony as to Positioning of Defendant for Purpose of Identification.—Testimony that defendant was placed for identification in the relative position to a witness as the perpetrator was seen by her just before committing a criminal offense is not objectionable as forcing defendant to give evidence against himself in denial of his constitutional rights. *State v. Neville*, 175 N.C. 731, 95 S.E. 55 (1918).

As to compelling accused to speak so that witness may identify his voice, see note, 27 N.C.L. Rev. 262.

Forced Production of Incriminating Documents Not Allowed.—The protection afforded to defendants in criminal action by this section is a matter of absolute right to them, and extends to the forced production of letters and other papers in their possession that may tend to incriminate them upon the trial. *State v. Hollingsworth*, 191 N.C. 595, 132 S.E. 667 (1926).

The introduction in evidence of incriminating papers taken from the defendant at the time of the arrest does not infringe the constitutional guarantee against self-incrimination, under this section, and when he takes the stand in his own behalf he waives his constitutional right against self-incrimination. *State v. Shoup*, 226 N.C. 69, 36 S.E.2d 697 (1946), distinguishing *State v. Hollingsworth*, 191 N.C. 595, 132 S.E. 667 (1926).

Arrest and Search of Person Suspected of Carrying Intoxicants.—Where an officer sees a person leave his automobile with his appearance indicating that he had something concealed on his person and reasonably giving the impression that the person was carrying intoxicating liquor, the officer may immediately arrest and search such person, and where a half gallon of liquor is found on the person of the defendant the action of the officer does not violate the provisions of this section.

Sec. 24. Right of jury trial in criminal cases. No person shall be convicted of any crime but by the unanimous verdict of a jury in open court. The General Assembly may, however, provide for other means of trial for misdemeanors, with the right of appeal for trial de novo.

Cross Reference.—For general provisions as to jurors, see G.S. § 9-1 et seq.

Editor's Note.—The provisions of this section are similar to those of Art. I, § 13, Const. 1868, as amended in 1946, and the cases in the following annotation were decided under that section.

For case law survey as to indictment and trial by jury, see 45 N.C.L. Rev. 878 (1967). For note on jurisdiction of courts-martial to try servicemen for civilian offenses, see 48 N.C.L. Rev. 380 (1970). For note on juries in the juvenile justice system, see 48 N.C.L. Rev. 666 (1970).

The essential attributes of trial by jury guaranteed by this section, are the number of jurors, their impartiality and a unanimous verdict, and former G.S. § 9-21, providing that the court may order the selection of an alternate juror in those cases which seem likely to be protracted, does not infringe upon this constitutional provision. *State v. Dalton*, 206 N.C. 507, 174 S.E. 422 (1934). See now § 9-18.

Defendant is entitled as of right to a jury

State v. Hickey, 198 N.C. 45, 150 S.E. 615 (1929).

Search of Automobile.—Admission in evidence of implements of housebreaking and narcotic drugs found in defendant's automobile was not in violation of the provisions of this section, where it clearly appeared that the person voluntarily consented, or permitted, or expressly invited and agreed to the search. *State v. McPeak*, 243 N.C. 243, 90 S.E.2d 501 (1955).

Rights of codefendant riding as a passenger or guest in defendant's automobile were not violated by the search of the car. *State v. McPeak*, 243 N.C. 243, 90 S.E.2d 501 (1955).

A guest or passenger in an automobile has no grounds for objection to a search of the car by a peace officer. *State v. Hamilton*, 264 N.C. 277, 141 S.E.2d 506 (1965).

VI. WITNESS FEES, COSTS, ETC.

Payment of Witnesses' Fees Not Placed on Public.—This provision, exempting an acquitted defendant from payment of necessary witness fees of the defense, does not require that they shall be paid by the public; the section operates only to deprive the witnesses of their common-law right to look to the defendant for payment. *State v. Hicks*, 124 N.C. 829, 32 S.E. 957 (1899).

trial as to every essential element of the crime charged, including the question as to his identity. *State v. Lewis*, 274 N.C. 438, 164 S.E.2d 177 (1968).

Jury Trial Cannot Be Waived after Plea of Not Guilty.—A defendant in a criminal prosecution for a felony or a misdemeanor may not waive his constitutional right to trial by jury in the superior court after entering a plea of "not guilty," without changing his plea, nor may the General Assembly permit him to do so by statute, and where the court, after a plea of "not guilty," finds the defendant guilty without a jury trial, the judgment will be stricken out and the cause remanded. *State v. Hill*, 209 N.C. 53, 182 S.E. 716 (1935). See also *State v. Muse*, 219 N.C. 226, 13 S.E.2d 229 (1941).

When a defendant in a criminal prosecution in the superior court enters a plea of not guilty he may not, without changing his plea, waive his constitutional right of trial by jury, and the determinative facts cannot be referred to the decision of

the court even by consent, but must be found by the jury. *State v. Muse*, 219 N.C. 226, 13 S.E.2d 229 (1941).

A jury trial cannot be waived in a criminal action; hence where the facts were agreed upon by the State and the accused and submitted to the judge for his decision, it was held, that such a procedure is not warranted by the law. *State v. Holt*, 90 N.C. 749 (1884). The only exception is for the trial of petty misdemeanors. *State v. Stewart*, 89 N.C. 563 (1883).

As to waiver in civil cases, see G.S. § 1A-1, Rule 39.

Upon defendant's appeal from judgment and sentence by the court after defendant had entered a conditional plea of guilty, the case will be remanded in order that a jury may pass upon defendant's guilt or innocence in accordance with defendant's constitutional right. *State v. Ellis*, 210 N.C. 170, 185 S.E. 662 (1936).

Where a defendant enters a plea of "not guilty" in the superior court, he may not thereafter, without being permitted to change his plea, waive his constitutional right of trial by jury. *State v. Rogers*, 162 N.C. 656, 78 S.E. 293, 46 L.R.A. (n.s.) 38, 1914A Ann. Cas. 867 (1913). And this applies to misdemeanors as well as to the more serious offenses. *State v. Pulliam*, 184 N.C. 681, 114 S.E. 394 (1922). The reason for such holding is to be found in the language of this section. *State v. Hartsfield*, 188 N.C. 357, 124 S.E. 629 (1924).

In the superior court, on indictment originating therein, trials by jury in a criminal action cannot be waived by the accused. *State v. Lewis*, 274 N.C. 438, 164 S.E.2d 177 (1968).

A conditional plea of *nolo contendere* is neither sanctioned by the law nor permitted by the Constitution. *State v. Norman*, 276 N.C. 75, 170 S.E.2d 923 (1969).

Conviction by Jury Necessary to Punishment.—It is fundamental that a defendant charged with crime, other than a petty misdemeanor, who pleads not guilty, can be punished only after conviction by a jury. *State v. Ellis*, 262 N.C. 446, 137 S.E.2d 840 (1964).

Unanimous Verdict Required. — A verdict of guilty rendered by a less number than twelve is unconstitutional. *State v. Berry*, 190 N.C. 363, 130 S.E. 12 (1925). The verdict must be rendered in open court before the presiding judge. *State v. Bazemore*, 193 N.C. 336, 137 S.E. 172 (1927).

The defendant is entitled as a matter of right to know whether each juror assented

to the verdict, announced by the juror who undertook to answer for the jury, and to that end he had the right to insist that a specific question be addressed to and answered by each juror in open court, as to whether he assented to said verdict. *State v. Boger*, 202 N.C. 702, 163 S.E. 877 (1932).

Poll of Jury.—The polling of the jury is a procedure whereby the jurors are asked individually the finding they have arrived at. The practice requires each juror to answer for himself, thus creating an individual response. The object is to give each juror an opportunity, before the verdict is recorded, to declare in open court his assent to the verdict which the foreman has returned, and thus to enable the court and the parties to ascertain with certainty that a unanimous verdict has been in fact reached and that no juror has been coerced or induced to agree to a verdict to which he has not fully assented. *Davis v. State*, 273 N.C. 533, 160 S.E.2d 697 (1968).

The predominant purpose of the poll is to ascertain if the verdict as tendered by the jury is the unanimous verdict of a jury in open court, as prescribed by this section. *Lipscomb v. Cox*, 195 N.C. 502, 142 S.E. 779 (1928).

When requested in apt time, both defendant and the solicitor for the State have a legal right to demand that the jury be polled. *Davis v. State*, 273 N.C. 533, 160 S.E.2d 697 (1968).

When requested in apt time, a party is entitled to have the jury polled; that is, to have an inquiry directed to each juror in order to ascertain his assent to the announced verdict. When the jury is so polled and the verdict is challenged, the record must affirmatively establish that each juror assented to the verdict entered. *State v. Dow*, 246 N.C. 644, 99 S.E.2d 860 (1957).

See note to G.S. 1A-1, Rule 49.

Right of Juror to Dissent.—When the verdict has been received from the foreman and entered, it is the duty of the clerk to cause the jury to hearken to their verdict as the court has it recorded, and to read it to them and say: "So say you all?" At this time any juror can retract on the ground of conscientious scruples, mistake, fraud, or otherwise, and his dissent would then be effectual. This right is surely one of the best safeguards for the protection of the accused, and as an incident to jury trials would seem to be a constitutional right, and its exercise is only a mode, more satisfactory to the prisoner, of ascertaining the fact that it is the verdict of the whole

jury. *Davis v. State*, 273 N.C. 533, 160 S.E.2d 697 (1968).

Special Verdict.—In a prosecution under G.S. § 49-2 a verdict upon the issues of paternity and nonsupport if resolved in favor of the State, is sufficient to support a judgment against defendant without a general verdict by the jury of guilty. This does not contravene the provisions of this section and § 23 of this article, requiring trial and verdict by jury in criminal cases. *State v. Ellis*, 262 N.C. 446, 137 S.E.2d 840 (1964).

Systematic Exclusion of Persons from Grand Jury Because of Race Requires Quashing Indictment against Person of That Race.—More than 60 years ago the Supreme Court of North Carolina stated clearly that this section of the Constitution requires the sustaining of a motion to quash an indictment of a negro who proves that the members of his race have been systematically excluded from the juries of the county in which he has been indicted in *State v. Peoples*, 131 N.C. 784, 42 S.E. 814 (1902). Since that time it has never been doubted by the courts of this State that the provisions of this section and § 19 of this article are to be so interpreted and that such systematic exclusion from the grand jury of persons, otherwise qualified, because of their race, requires, upon motion duly made, the quashing of an indictment returned against a member of that race by such grand jury irrespective of the fact that all members of the grand jury were, themselves, qualified jurors. *State v. Knight*, 269 N.C. 100, 152 S.E.2d 179 (1967).

See also note to § 19 of this article. And see § 26 of this article.

But Exclusion of Class of Persons from Jury Service Will Not Always Invalidate Indictment.—Even the complete exclusion, by State law, of a group or class of persons from eligibility for jury service will not make invalid an indictment by a grand jury, selected in accordance with such State law, so long as there is no reasonable basis for the conclusion that the ineligible group or class would bring to the deliberations of the jury a point of view not otherwise represented upon it, at least where the defendant is not a member of the excluded group. *State v. Knight*, 269 N.C. 100, 152 S.E.2d 179 (1967).

Use of a jury box containing only the names of property owners was not per se discriminatory and did not unfairly narrow the choice of jurors so as to impinge defendant's statutory or constitutional rights. *State v. Rogers*, 275 N.C. 411, 168 S.E.2d 345 (1969).

Failure of defendant in a criminal prosecution to exhaust his peremptory challenges does not affect his right to attack an illegally constituted jury. *State v. Emery*, 224 N.C. 581, 31 S.E.2d 858 (1944).

Challenge of Jurors for Opposition to Death Penalty.—In a prosecution of a defendant charged with first degree murder, the trial court properly sustained the State's challenge for cause to each juror who stated that in no event and under no circumstances could he render a verdict of guilty against any person, regardless of the evidence, if the punishment was death. *State v. Miller*, 276 N.C. 681, 174 S.E.2d 481 (1970).

Death Penalty and Right to Jury Trial.—North Carolina does not permit an accused who pleads not guilty to waive a jury trial. The accused may avoid a jury trial only if he pleads guilty and, under repealed G.S. § 15-162.1, a plea of guilty could not result in a punishment more severe than life imprisonment. Thus, a person accused of a capital crime in North Carolina was faced with the awesome dilemma of risking the death penalty in order to assert his rights to a jury trial and not to plead guilty, or, alternatively, of pleading guilty to avoid the possibility of capital punishment. Precisely this sort of inhibitory or chilling effect upon the exercise of constitutional rights has been condemned by the United States Supreme Court, because such a statutory scheme needlessly encourages guilty pleas and jury waivers. *Alford v. North Carolina*, 405 F.2d 340 (4th Cir. 1968), decided before the repeal of G.S. § 15-162.1.

Section Inapplicable to Proceeding under Juvenile Court Act.—A constitutional guaranty of trial by jury has no application to a proceeding under the Juvenile Court Act. In re *Burrus*, 275 N.C. 517, 169 S.E.2d 879 (1969).

Absent a statute providing for a jury trial, it is almost universally held that in juvenile court delinquency proceedings the alleged delinquent has no right under the pertinent State or federal Constitution to demand that the issue of his delinquency be determined by a jury. In re *Burrus*, 275 N.C. 517, 169 S.E.2d 879 (1969).

Separate Provisions for Petty Misdemeanors.—The very purpose of conferring on the legislature power to provide means of trial other than by jury in the ordinary way, as to petty misdemeanors, is to avoid the inconvenience, expense and delay attendant upon indictment by the grand jury and the trial by the jury where the parties choose to waive it, in the ordinary course of criminal procedure. *State v. Crook*, 91

N.C. 536 (1884). See *State v. Boykin*, 211 N.C. 407, 191 S.E. 18 (1937).

The legislature has power to designate the unlawful possession and transportation of intoxicants a petty misdemeanor and to provide means of trial for the offense other than by indictment and trial by jury. *State v. Shine*, 222 N.C. 237, 22 S.E.2d 447 (1942).

Under this section indictment by grand jury is dispensed with in the trial of petty misdemeanors. *State v. Lytle*, 138 N.C. 738, 51 S.E. 66 (1905).

It is permissible under this section for the General Assembly to provide for the trial of petty misdemeanors in inferior courts with the right of appeal to the superior court. *State v. Camby*, 209 N.C. 50, 182 S.E. 715 (1935), citing *State v. Lytle*, 138 N.C. 738, 51 S.E. 66 (1905); *State v. Brittain*, 143 N.C. 668, 57 S.E. 352 (1907); *State v. Hyman*, 164 N.C. 411, 79 S.E. 284 (1913); *State v. Tate*, 169 N.C. 373, 85 S.E. 383 (1915); *State v. Pasley*, 180 N.C. 695, 104 S.E. 533 (1920).

The provisions of this section empower the legislature to provide means other than petit juries for the trial of petty misdemeanors, with the right of appeal. *State v. Thomas*, 236 N.C. 454, 73 S.E.2d 283 (1952); *State v. Underwood*, 244 N.C. 68, 92 S.E.2d 461 (1956).

The constitutional right of a defendant charged with a misdemeanor to have a jury trial is not infringed by the fact that he has first to submit to trial without a jury in the district court and then appeal to superior court in order to obtain a jury trial. *State v. Sherron*, 4 N.C. App. 386, 166 S.E.2d 836 (1969).

Right to Jury Trial Is Preserved by Requirement of Trial de Novo on Appeal.—The right of a trial by jury in a criminal action is preserved to the accused by the statutory requirement of a trial de novo in the superior court on appeal from a court of subordinate jurisdiction, and conviction in the superior court cannot be had unless upon the verdict of the jury, in accordance with the provisions of this section of the Constitution. *State v. Pulliam*, 184 N.C. 681, 114 S.E. 394 (1922).

Where there is the right to appeal to the superior court and there obtain a trial de novo before a petit jury, the General Assembly can abolish jury trials in an inferior court by a direct enactment to that effect without transgressing this section. *State v. Norman*, 237 N.C. 205, 74 S.E.2d 602 (1953).

The constitutional guaranty of a jury trial is met by the right of appeal which

is given from an inferior court, in all cases, to the superior court. *State v. Lytle*, 138 N.C. 738, 51 S.E. 66 (1905). And this is true where the appeal is from a recorder's court. *State v. Hyman*, 164 N.C. 411, 79 S.E. 284 (1913).

In disbarment proceedings respondent's exception on the ground that the proceedings deprived him of his right to trial by jury is untenable when the matters in issue are determined by a jury upon his appeal to the superior court. *In re West*, 212 N.C. 189, 193 S.E. 134 (1937).

Waiver of Right of Appeal.—A person on trial for a misdemeanor in an inferior court with right of appeal to the superior court, may waive his constitutional right to a trial by jury by consenting to the judgment therein entered, or by not appealing therefrom, and his afterwards employing an attorney and moving for the appeal within the time allowed by the statute applicable will not affect the fact that he had personally acquiesced in the judgment entered. *State v. Lakey*, 191 N.C. 571, 132 S.E. 570 (1926).

Where, in a prosecution in the recorder's court for wilful failure to support his illegitimate child, defendant complies with the terms of the suspended judgment by making two payments according to its terms, paying the costs of court, and by executing a compliance bond pursuant to the terms of the judgment, he will be deemed to have knowingly and intelligently waived his statutory right to appeal to the superior court. *State v. Cooke*, 268 N.C. 201, 150 S.E.2d 226 (1966).

Trial in Superior Court upon Original Accusation.—See note to § 22 of this article.

Statutes purporting to authorize the transfer of untried misdemeanor cases from an inferior court to the superior court and the initial trial of such transferred cases in the superior court upon the warrant of the inferior court are repugnant to the declaration plainly inherent in the second sentence of this section that a person charged with the commission of a misdemeanor cannot be put on trial in the superior court upon the warrant of an inferior court unless he has been tried upon such warrant in the inferior court and has appealed from that court to the superior court. *State v. Thomas*, 236 N.C. 454, 73 S.E.2d 283 (1952).

Miscellaneous Cases.—The North Carolina Workmen's Compensation Act was held not to be unconstitutional for that it impaired the right of trial by jury, guaranteed by this section. *Hanks v. Southern*

Pub. Util. Co., 204 N.C. 155, 167 S.E. 560 (1933).

For case of emergency, such as illness of juror, see *State v. Wheeler*, 185 N.C. 670, 116 S.E. 413 (1923); denial of partnership, see *Woodland & Co. v. Southgate Packing Co.*, 186 N.C. 116, 118 S.E. 898 (1923).

Sec. 25. *Right of jury trial in civil cases.* In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable.

Cross Reference.—As to waiver of jury trial, see G.S. § 1A-1, Rule 39.

Editor's Note.—The provisions of this section are similar to those of the first sentence of Art. I, § 19, Const. 1868, as amended in 1946, and the cases in the following annotation were decided under that section.

As to less than unanimous jury verdicts in civil cases, see 27 N.C.L. Rev. 539. For case law survey as to indictment and trial by jury, see 45 N.C.L. Rev. 878 (1967).

The ancient mode of trial by jury has been preserved in the present Constitution. *Chesson v. Kieckhefer Container Co.*, 223 N.C. 378, 26 S.E.2d 904 (1943).

History teaches that a jury can best settle factual controversies, and for that reason jury trials ought to remain sacred and inviolable. *Mangum v. Yow*, 263 N.C. 525, 139 S.E.2d 537 (1965).

Right to a jury trial is guaranteed by this section, and where the parties do not consent to trial by the court, it may not determine, prior to the introduction of evidence, an issue of fact joined by the pleadings. *Hershey Corp. v. Atlantic Coast Line R.R.*, 207 N.C. 122, 176 S.E. 265 (1934).

The Constitution of North Carolina guarantees to every litigant the sacred and inviolable right to demand a trial by jury of the issues of fact arising in all controversies respecting property, and he cannot be deprived of this right except by his own consent. *Scott Poultry Co. v. Bryan Oil Co.*, 272 N.C. 16, 157 S.E.2d 693 (1967).

Both in Civil and Criminal Cases.—The right to trial by jury is beyond controversy, both in civil and criminal cases. *State v. Rogers*, 162 N.C. 656, 78 S.E. 293, 46 L.R.A. (n.s.) 38, 1914A, Ann. Cas. 867 (1913) (dissenting opinion).

The policy for the preservation of the right to trial by jury provided for by this section of the Constitution is ordinarily for the legislature to declare. *Board of Educ. v. Forrest*, 193 N.C. 519, 137 S.E. 431 (1927).

But the right to trial by jury guaranteed by this section, does not apply to matters

Assault and battery is not a petty misdemeanor within the proviso to this section. *State v. Stewart*, 89 N.C. 563 (1883); *Schick v. United States*, 195 U.S. 65, 24 S. Ct. 826, 49 L. Ed. 99 (1904).

As to enjoining illegal practices under act regulating pharmacy, see note to G.S. § 90-85.1.

concerned with the administration of the tax laws and the machinery for the collection of taxes, unless the statute affords express authority for this method of determining questions of fact. *State ex rel. Unemployment Compensation Comm'n v. J.M. Willis Barber & Beauty Shop*, 219 N.C. 709, 15 S.E.2d 4 (1941).

Right Not Unqualified. — This section does not confer the right to demand the intervention of a jury absolutely and unqualifiedly, but only in cases involving issues of fact. *McQueen v. Peoples Nat'l Bank*, 111 N.C. 509, 16 S.E. 270 (1892).

The right to trial by jury applies exclusively to actions in which legal rights are involved. *State ex rel. Utilities Comm'n v. Great S. Trucking Co.*, 223 N.C. 687, 23 S.E.2d 201 (1943) (concurring opinion).

This constitutional provision applies only to cases in which the prerogative existed at common law or by statute at the time the Constitution was adopted. *Chowan & S.R.R. v. Parker*, 105 N.C. 246, 11 S.E. 328 (1890); *Groves v. Ware*, 182 N.C. 553, 109 S.E. 568 (1921); *Belk's Dep't Store v. Guilford County*, 222 N.C. 441, 23 S.E.2d 897 (1943); *Kaperonis v. North Carolina State Highway Comm'n*, 260 N.C. 587, 133 S.E.2d 464 (1963); *In re Wallace*, 267 N.C. 204, 147 S.E.2d 922 (1966).

In *Groves v. Ware*, 182 N.C. 553, 109 S.E. 568 (1921), it was held that the right to a trial by jury as provided in this section applies only to cases in which the prerogative existed at common law or was procured by statute at the time the Constitution was adopted, and not to those in which the right and the remedy are thereafter created by statute. The section cannot be invoked to deprive a public official of the discretion with which he is clothed by legislative enactment. *McInnish v. Board of Educ.*, 187 N.C. 494, 122 S.E. 182 (1924).

"Jury"—The word "jury" is to be given the signification which it had when the Constitution was adopted, i.e., a body of twelve men in a court of justice duly selected and impaneled in the case to be tried. *State v. Emery*, 224 N.C. 581, 31 S.E.2d 858 (1944),

decided prior to the 1946 amendment to Art. I, § 19, of the Constitution of 1868, which amendment provided that no person should be excluded from jury service on account of sex.

"Trial" refers to a dispute and issue of fact, and the expression "trial by jury," as used in this section, does not necessarily signify that every legal controversy is to be determined by a jury. *Board of County Comm'rs v. George*, 182 N.C. 414, 109 S.E. 77 (1921).

Polling Jury in Civil Actions. — Under this section the losing party in a civil action may demand a polling of the jury upon the return of the verdict, as a matter of right. *Culbreth v. Borden Mfg. Co.*, 189 N.C. 208, 126 S.E. 419 (1925).

Upon the coming in of the verdict in a civil action, either party to the action has the constitutional right to have the jury polled before accepting the verdict as a unanimous one. In *re Will of Sugg*, 194 N.C. 638, 140 S.E. 604 (1927). See note under § 24 of this article.

Jury Trial Not Required at Each Stage of Proceedings.—This section, guaranteeing the right of trial by jury in "controversies at law respecting property," includes equitable and legal elements involved in the determination of the issues made by the pleadings, but it is not required that a trial by jury be had at each stage of the proceedings when this right has elsewhere therein been properly safeguarded by statute. *Board of County Comm'rs v. George*, 182 N.C. 414, 109 S.E. 77 (1921).

Entering Judgment without Aid of Jury.—Where the parties to a civil action do not waive trial by jury nor consent that the judge find the facts, it is error for the judge to enter judgment without the aid of the jury on the controverted issues of fact raised by the pleadings. *Icenhour v. Bowman*, 233 N.C. 434, 64 S.E.2d 428 (1951).

It was error for a trial court to determine issues of fact raised by the pleadings in the absence of waiver of the constitutional and statutory right to a trial by jury, there being no question of reference. *Sparks v. Sparks*, 232 N.C. 492, 61 S.E.2d 356 (1950).

Compulsory Reference Not Violative of Section.—See note to G.S. § 1A-1, Rule 53.

Jury Trial in Case of Compulsory Reference.—Every litigant has the constitutional right of trial by jury unless he voluntarily waives it, and, in case of a compulsory reference made to facilitate the trial of a cause, he can renew his demand for a jury trial by excepting to the report of

the referee and pointing out the findings so excepted to as a basis for issues. *State ex rel. Wilson v. Featherstone*, 120 N.C. 446, 27 S.E. 124 (1897).

Burden of Proof.—The rules of law as to the burden of proof between the parties to litigation respecting damages to property resulting from negligence is one of substantial right guaranteed by the federal Constitution, and more emphatically by this section of the State Constitution. *McDowell v. Norfolk S.R.R.*, 186 N.C. 571, 120 S.E. 205, 42 A.L.R. 857 (1923).

Where there is more than a scintilla of evidence to sustain the allegations of the complaint, the case must be submitted to the jury, its sufficiency to warrant a verdict for plaintiff being for the determination of the jury, subject only to the discretionary power of the trial court to set the verdict aside in proper cases, and a strict adherence to this rule is necessary to preserve the right of trial by jury guaranteed under this section. *Fox v. Asheville Army Store*, 215 N.C. 187, 1 S.E.2d 550 (1939).

Party Charged with Maintaining Nuisance Has Right to Jury Trial. — A party charged with the maintenance of a public nuisance, as defined by G.S. § 19-1, has a right to traverse the factual allegations of the complaint. If he does so, he cannot be deprived of his right to a jury trial on the issues raised by the pleadings. *State ex rel. Bowman v. Malloy*, 264 N.C. 396, 141 S.E.2d 796 (1965).

Under Workmen's Compensation Act trial by jury is not a constitutional right. *Hagler v. Mecklenburg Highway Comm'n*, 200 N.C. 733, 158 S.E. 383 (1931).

Eminent Domain Proceeding Is Not Controversy Concerning Property. — A proceeding to assess damages for the taking of land by eminent domain is not a controversy concerning property within the meaning of this section. *Kaperonis v. North Carolina State Highway Comm'n*, 260 N.C. 587, 133 S.E.2d 464 (1963).

Since Ownership Is Not Issue in Eminent Domain.—This section is a constitutional guaranty of jury trial when the issue determinative of the rights of the litigants is: "Who owns the land, plaintiff or defendant?" This issue does not arise when the State, or its agency, exercises the power of eminent domain. The phrase "eminent domain" by definition admits condemnor did not own, but took or appropriated the property of another for a public purpose. *Wescott v. State Highway Comm'n*, 262 N.C. 522, 138 S.E.2d 133 (1964).

Statutory Provisions Establishing Conditions Precedent for Jury Trial. — The

provisions of chapter 1057, Session Laws of 1951, setting up the procedure for adjudicating small claims in the Superior Court of Forsyth County, to the effect that no jury trial shall be had in an action instituted pursuant thereto, unless a demand is made therefor in the manner set out in the act, and the costs advanced and the prosecution bond filed as required therein, are not unreasonable provisions and do not violate this section. *Better Home Furniture Co. v. Baron*, 243 N.C. 502, 91 S.E.2d 236 (1956).

Judgment of Dismissal as Offending Plaintiff's Right to Jury Trial.—Judgment of dismissal of plaintiff's action offends against the plaintiff's constitutional right of jury trial where these factors come into focus: (1) The record discloses no stipulation by which jury trial was waived or consent was given for the court to find facts; (2) the plaintiff's evidence was sufficient to make out a prima facie case in accordance with the allegations of the complaint; (3) the defendant offered no evidence; (4) the plaintiff's evidence does not establish the truth of the defendant's affirmative defense. *Ingle v. McCurry*, 243 N.C. 65, 89 S.E.2d 745 (1955).

Power of Court to Increase Jury Award by Additur.—While it may be suggested that the practice of additur deprives a defendant of his constitutional right to a jury trial, guaranteed by this section, the obvious answer is that the defendant can waive that right, which he does when he consents to pay the additur, since in this State the parties to a civil action have a right to waive a jury trial. *Caudle v. Swanson*, 248 N.C. 249, 103 S.E.2d 357 (1958).

The additur procedure followed in the instant case, with the defendants' consent, by which the jury verdict for the plaintiff was increased by the trial court, in no way infringed upon plaintiff's right to a trial by jury as guaranteed to him by this section. *Caudle v. Swanson*, 248 N.C. 249, 103 S.E.2d 357 (1958).

For note on the power of the court to increase a jury award by additur, see 37 N.C.L. Rev. 169 (1959).

This section does not require court review of the valuation of land for taxation, or determination of such value by a jury in a de novo hearing, and will not support resort to certiorari for that purpose. *Belk's Dep't Store v. Guilford County*, 222 N.C. 441, 23 S.E.2d 897 (1943).

Controversies between Board of Education and County Commissioners. — See *Board of Educ. v. Board of Comm'rs*, 182

N.C. 571, 109 S.E. 630 (1921), citing *Board of Educ. v. Board of County Comm'rs*, 174 N.C. 469, 93 S.E. 1001 (1917).

Proceedings before the judge to remove a prosecuting attorney from office "for willful misconduct or maladministration in office," do not require an issue to be submitted to the jury, such office is not a property right under the provisions of this section. *State ex rel. Hyatt v. Hamme*, 180 N.C. 684, 104 S.E. 174 (1920).

Subsistence Pendente Lite. — Provisions of former G.S. § 50-16 empowering the court to allow subsistence and counsel fees pendente lite to plaintiff in an action for alimony without divorce did not violate this section. *Peele v. Peele*, 216 N.C. 298, 4 S.E.2d 616 (1939).

Miscellaneous Cases. — In an action for damages for negligently setting fire to plaintiff's woods by sparks from defendant's engine, it was held that this section guaranteed, as a "sacred and inviolable" right, that the plaintiff might have the case submitted to the jury. *Williams v. Atlantic Coast Line R.R.*, 140 N.C. 623, 53 S.E. 448 (1906).

In proceedings before the corporation commission there is no jury trial provided, and hence if no appeal lies therefrom by the plaintiff he is deprived of this sacred and inviolable right as guaranteed by this section. *Walls v. Strickland*, 174 N.C. 298, 93 S.E. 857 (1917) (concurring opinion).

When in proceedings for alimony without divorce the pleadings raise the issues of the validity of marriage between the parties, or whether the husband had separated himself from the wife and failed to provide her suitable or reasonable sustenance, or the husband is a drunkard or spendthrift (former G.S. § 50-16), the right of trial by jury arises to the defendant, and the case should be transferred by the judge to the civil issue docket for the purpose. *Crews v. Crews*, 175 N.C. 168, 95 S.E. 149 (1918).

Where there is nothing in the record to indicate that petitioner and respondent have waived their constitutional and statutory right to have the issue of fact joined on the pleadings tried by a jury, and there is no question of reference, the judge had no authority to enter an order affirming the order of the assistant clerk of the superior court, which in effect was a determination by the judge of the issue of fact raised by the pleadings and a finding by him that money deposited in the office of the clerk of the superior court was funds belonging to a decedent and an order that said money be distributed to the administrator c.t.a. of her last will and testament. *In re Wallace*, 267 N.C. 204, 147 S.E.2d 922 (1966).

Sec. 26. *Jury service.* No person shall be excluded from jury service on account of sex, race, color, religion, or national origin.

Editor's Note.—The provisions of this section are similar to those of the second sentence of Art. I, § 19, Const. 1868, as amended in 1946.

Sec. 27. *Bail, fines, and punishments.* Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

Cross References.—See note to G.S. § 14-3. For general provisions as to bail, see § 15-102 et seq.

Editor's Note.—The provisions of this section are similar to those of Art. I, § 14, Const. 1868, and the cases in the following annotation were decided under that section.

For article on punishment for crime in North Carolina, see 17 N.C.L. Rev. 205. For case law survey as to cruel and unusual punishment, see 44 N.C.L. Rev. 936 (1966); 45 N.C.L. Rev. 864 (1967). For note on appellate review of legal but excessive sentences, see 44 N.C.L. Rev. 1118 (1966). For comment on bail in North Carolina, see 5 Wake Forest Intra. L. Rev. 300 (1969).

This section restricts the judiciary from imposing excessive punishments where the legislature has not prescribed a fixed maximum, and does not apply to the legislative power to impose the penalty for acts made an offense by them. *State v. Blake*, 157 N.C. 608, 72 S.E. 1080 (1911).

This section has been considered by the Supreme Court as an admonition to the judiciary in imposing sentence left to an extent within its discretion by the statutes; however, there is a decided intimation that in extraordinary and exceptional cases it may be held to affect legislative enactments as well. *State v. Smith*, 174 N.C. 804, 93 S.E. 910 (1917).

Test as to Reasonableness of Punishment.—There are two things which have been looked upon as very good guides in determining the reasonableness of punishment: (1) what has formerly been expressly done in like cases, and (2) for the want of such particular discretion then to consider that which comes nearest to it. *State v. Driver*, 78 N.C. 423 (1878).

What constitutes cruel and unusual punishment is a question of law for the court and not subject to proof by expert opinion evidence. *State v. Rogers*, 275 N.C. 411, 168 S.E.2d 345 (1969).

Discretion of Court.—Within the limits of the sentence permitted by the law, the character and extent of the punishment is committed to the sound discretion of the trial court, and may be reviewed only in case of manifest and gross abuse. *State*

v. McKinney, 4 N.C. App. 107, 165 S.E.2d 689 (1969).

It ought to be left to the judge who inflicts it under the circumstances of each case, and it ought not to be interfered with, except when the abuse is palpable. *State v. Driver*, 78 N.C. 423 (1878), approved, *State v. Reid*, 106 N.C. 714, 11 S.E. 315 (1890).

Punishment within Limits Fixed by Statute Cannot Be Held Cruel or Unusual.—A punishment which is within the limits authorized by statute cannot be held cruel or unusual in the constitutional sense. *State v. Welch*, 232 N.C. 77, 59 S.E.2d 199 (1950); *State v. Carter*, 269 N.C. 697, 153 S.E.2d 388 (1967).

It is well established that a sentence which does not exceed the maximum prescribed by statute for the offense of which the defendant has been convicted or of which he has entered a plea of guilty does not constitute cruel and unusual punishment forbidden by this section. *State v. LePard*, 270 N.C. 157, 153 S.E.2d 875 (1967); *State v. Lovelace*, 271 N.C. 593, 157 S.E.2d 81 (1967).

When punishment does not exceed the limits fixed by the statute, it cannot be considered cruel and unusual punishment in a constitutional sense. *State v. Davis*, 267 N.C. 126, 147 S.E.2d 570 (1966); *State v. Bruce*, 268 N.C. 174, 150 S.E.2d 216 (1966); *State v. Greer*, 270 N.C. 143, 153 S.E.2d 849 (1967); *State v. Robinson*, 271 N.C. 448, 156 S.E.2d 854 (1967); *State v. Mos-teller*, 3 N.C. App. 67, 164 S.E.2d 27 (1968); *State v. McKinney*, 4 N.C. App. 107, 165 S.E.2d 689 (1969); *State v. Powell*, 6 N.C. App. 8, 169 S.E.2d 210 (1969); *State v. Price*, 8 N.C. App. 94, 173 S.E.2d 644 (1970).

A punishment which is within the limits authorized by the statute cannot be held to be illegal or excessive in the constitutional sense, offending this section. *Mathis v. North Carolina*, 266 F. Supp. 841 (M.D.N.C. 1967).

Punishments within the statutory maximums cannot constitute cruel and unusual punishment. *State v. Hopper*, 271 N.C. 464, 156 S.E.2d 857 (1967).

Sentences which do not exceed the maximum prescribed by the applicable statute do not violate defendant's constitutional

rights. *State v. Hilton*, 271 N.C. 456, 156 S.E.2d 833 (1967).

Sentences imposed which are within valid statutory limits cannot be considered cruel and unusual punishment in a constitutional sense. *State v. Culp*, 5 N.C. App. 625, 169 S.E.2d 10 (1969).

A sentence which finds complete sanction in a valid legislative enactment cannot be deemed violative of this constitutional provision forbidding the infliction of cruel or unusual punishments. *State v. Stansbury*, 230 N.C. 589, 55 S.E.2d 185 (1949).

Unless Punishment Provisions of Statute Itself Are Unconstitutional.—When punishment does not exceed the limits fixed by statute it cannot be classified as cruel and unusual in a constitutional sense, unless the punishment provisions of the statute itself are unconstitutional. *State v. Rogers*, 275 N.C. 411, 168 S.E.2d 345 (1969).

When No Time Is Fixed by Statute.—It is well settled that when no time is fixed by the statute, an imprisonment for two years will not be held cruel and unusual. *State v. Farrington*, 141 N.C. 844, 53 S.E. 954 (1906), citing *State v. Driver*, 78 N.C. 423 (1878); *State v. Miller*, 94 N.C. 904 (1886); *State v. Moschoures*, 214 N.C. 321, 199 S.E. 92 (1938); *State v. Crandall*, 225 N.C. 148, 33 S.E.2d 861 (1945); *State v. Lee*, 247 N.C. 230, 100 S.E.2d 372 (1957).

Where the question of punishment is left to the sound discretion of the court, the court is limited only by the prohibition against cruel or unusual punishment in this section. *State v. Richardson*, 221 N.C. 209, 19 S.E.2d 863 (1942).

Where there is a conviction of the violation of two separate criminal statutes consolidated and tried as two counts under one bill of indictment, a sentence for each offense—the one to begin upon the expiration of the other term—confining the punishment as to each within that prescribed in the statute relating to it, cannot be considered under the facts of the case as cruel and unusual within the inhibition of this section. *State v. Malpass*, 189 N.C. 349, 127 S.E. 248 (1925).

Imposition of two life sentences to run consecutively does not contravene the constitutional prohibition against cruel and unusual punishment. *State v. Mosteller*, 3 N.C. App. 67, 164 S.E.2d 27 (1968).

The imposition of sentence of life imprisonment upon conviction of the offense of kidnapping, the sentence to run consecutively after sentence of life imprisonment theretofore entered in a prosecution

of defendant for rape, is not cruel or unusual punishment and is not forbidden by constitutional provisions. *State v. Bruce*, 268 N.C. 174, 150 S.E.2d 216 (1966).

The death penalty, or its alternative when the jury so recommends, is not prohibited as cruel and unusual in the constitutional sense, and its imposition upon conviction of the crime of rape is not unconstitutional per se. *State v. Rogers*, 275 N.C. 411, 168 S.E.2d 345 (1969).

Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty. *State v. Rogers*, 275 N.C. 411, 168 S.E.2d 345 (1969).

Death Penalty for Rape.—The imposition of the death penalty upon conviction of the crime of rape is not unconstitutional per se. Being specifically authorized both by the Constitution of this State and by statute, it is not cruel and unusual punishment in the constitutional sense. *State v. Yoes*, 271 N.C. 616, 157 S.E.2d 386 (1967).

Scope of Evidence in Determining Punishment.—In making a determination of what punishment should be imposed after a plea of guilty or nolo contendere, a court is not confined to evidence relating to the offense charged. It may look anywhere, within reasonable limits, for other facts calculated to enable it to act wisely in fixing punishment. Hence, it may inquire into such matters as the age, the character, the education, the environment, the habits, the mentality, the propensities, and the record of the person about to be sentenced. In so doing the court is not bound by the rules of evidence which obtain in a trial where guilt or innocence is put in issue by a plea of not guilty. *State v. McKinney*, 4 N.C. App. 107, 165 S.E.2d 689 (1969).

Letter to Parole Commissioner and Instructions to Solicitor Not Part of Sentence.—Defendant's contention that he was subjected to cruel and unusual punishment in that the trial court sentenced him to the maximum prison term permitted by statute for the offense of seduction of which he was convicted, and in addition dictated a letter to the parole commissioner in which he requested that no clemency be extended defendant, and also directed the solicitor to institute prosecution against defendant for failure to support his illegitimate child, is untenable, since the letter to the parole commissioner and the instructions to the solicitor are not parts of the sentence im-

posed. *State v. Brackett*, 218 N.C. 369, 11 S.E.2d 146 (1940).

Miscellaneous Cases.—A sentence of not less than 25 nor more than 30 years in the State's prison, upon a plea of guilty of possession of weapons and implements for house breaking. *State v. Cain*, 209 N.C. 275, 183 S.E. 300 (1936). Sentence of hard labor for 30 years upon conviction of a male person for carnally knowing a female child 13 years of age, *State v. Swindell*, 189 N.C. 151, 126 S.E. 417 (1925). Upon conviction of manslaughter, punishment for 9 years in the penitentiary, *State v. Lance*, 149 N.C. 551, 63 S.E. 198 (1908).

The punishment for vagrancy cannot exceed 30 days under the statute. In re *Watson*, 157 N.C. 340, 72 S.E. 1049 (1911). Fine or imprisonment for the owners of bird dogs to permit them to run at large during the closed season for quail, *State v. Blake*, 157 N.C. 608, 72 S.E. 1080 (1911). Punishment of 30 days confinement in jail for carrying concealed weapons, *State v. Woodlief*, 172 N.C. 885, 90 S.E. 137 (1916). See also *State v. Mangum*, 187 N.C. 477, 121 S.E. 765 (1924).

A sentence prescribed by statute for the violation of prohibition law is held not to be cruel or unusual within the meaning of this section. *State v. Daniels*, 197 N.C. 285, 148 S.E. 244 (1929).

Although not expressly limited by statute, the extent of punishment for the crime of criminal trespass is limited by this section proscribing cruel or unusual punishments, and decisions of the State court indicate that imprisonment for up to two years would not be an "unusual punishment." *Klopfer v. North Carolina*, 368 U.S. 213, 87 S. Ct. 226, 17 L. Ed. 2d 141 (1967).

A sentence to 18 months labor on the roads entered upon defendant's plea of guilty to a charge of drawing and uttering a worthless check was held not to be "cruel and unusual" in a constitutional sense. *State v. White*, 230 N.C. 513, 53 S.E.2d 436 (1949).

A sentence of 24 to 30 years for the offense of robbery with firearms does not exceed the maximum prescribed by G.S. § 14-87 and does not constitute cruel and unusual punishment. *State v. LePard*, 270 N.C. 157, 153 S.E.2d 875 (1967).

A sentence for robbery which was within the statutory maximum did not constitute the cruel and unusual punishment for-

bidden by this section. *State v. Wither- spoon*, 271 N.C. 714, 157 S.E.2d 362 (1967).

Three sentences of 47 months each, to run concurrently, imposed on defendant's plea of *nolo contendere* to three felony counts charging felonious breaking and entering, larceny, and larceny of an automobile, being well within the statutory limits could not be considered cruel and unusual punishment. *State v. Carter*, 269 N.C. 697, 153 S.E.2d 388 (1967).

A sentence of 25 years' imprisonment, imposed after a plea of guilty to 4 indictments charging felonious breaking and entering and larceny in violation of G.S. §§ 14-54 and 14-72, did not exceed the statutory maximum and was not cruel and unusual punishment in the constitutional sense. *State v. Greer*, 270 N.C. 143, 153 S.E.2d 849 (1967).

The imposition of a sentence of imprisonment of 7 to 9 years upon plea of *nolo contendere* to the offenses of breaking and entering and larceny is not cruel or unusual punishment in a constitutional sense. *State v. Robinson*, 271 N.C. 448, 156 S.E.2d 854 (1967).

A sentence of not less than 20 years nor more than 30 years on a plea of guilty to the charge of unlawful possession of implements of housebreaking, constitutes cruel and unusual punishment within the meaning of this section. *State v. Blackmon*, 260 N.C. 352, 132 S.E.2d 880 (1963), overruling *State v. Swindell*, 189 N.C. 151, 126 S.E. 417 (1925), and *State v. Cain*, 209 N.C. 275, 183 S.E. 300 (1936).

A sentence of imprisonment for 12 months for felonious escape under G.S. § 148-45 does not constitute cruel and unusual punishment, in violation of this section. *State v. Dixon*, 5 N.C. App. 514, 168 S.E.2d 418 (1969).

Where a sentence of 12 to 20 years' imprisonment was imposed for involuntary manslaughter, the punishment imposed was within the discretionary limits fixed by G.S. § 14-18, and while the punishment inflicted was substantial, the judgment pronounced did not come within the constitutional inhibition against "cruel or unusual punishments." *State v. Smith*, 238 N.C. 82, 76 S.E.2d 363 (1953). See *State v. Brooks*, 260 N.C. 186, 132 S.E.2d 354 (1963), in which the sentence was for not less than 10 nor more than 20 years' imprisonment.

Sec. 28. Imprisonment for debt. There shall be no imprisonment for debt in this State, except in cases of fraud.

Cross Reference.—See G.S. § 1-410 and note thereto.

Editor's Note.—The provisions of this section are similar to those of Art. I, § 16,

Const. 1868, and the cases in the following annotation were decided under that section.

The purpose of this section is to prevent the use of the criminal process to enforce the payment of civil obligations, directly or indirectly. *State v. Caudle*, 276 N.C. 550, 173 S.E.2d 778 (1970).

What Constitutes Debt.—A fine or penalty imposed by a municipal ordinance is treated as a debt and, under this section of the Constitution, a person from whom it is attempted to be collected is exempt from arrest. *State v. Earnhardt*, 107 N.C. 789, 12 S.E. 426 (1890). A judgment on a note is likewise a debt and the defendant cannot be arrested therefor. *Stewart v. Bryan*, 121 N.C. 46, 28 S.E. 18 (1897).

But costs of prosecution against a prosecutor (upon acquittal of the accused or nolle prosequi entered), or against the accused upon a verdict of guilty, or a fine imposed, do not constitute a debt within the meaning of this section of the Constitution, and hence the defendant may be imprisoned for nonpayment of the same. *State v. Wallin*, 89 N.C. 578 (1883). See G.S. §§ 6-45, 6-46. Nor is the duty of maintaining a bastard child imposed upon the father such a debt as is contemplated by this section. *State v. Palin*, 63 N.C. 472 (1869), approved, *State v. Beasley*, 75 N.C. 211 (1876).

Any judgment rendered for nonperformance is a debt and can only be enforced by a levy on and sale of defendant's property. He cannot be imprisoned. *Wilson v. Wilson*, 261 N.C. 40, 134 S.E.2d 240 (1964).

Section Not Applicable to Tort Actions.—The provision of this section of the Constitution has no application to actions for tort; it is confined to causes of action arising ex contractu. *Long v. McLean*, 88 N.C. 3 (1883). See *Ledford v. Smith*, 212 N.C. 447, 193 S.E. 722 (1937). As to arrest for damages arising from tort, see G.S. § 1-410, subdivision (1) and the note thereto.

No Imprisonment Except Where There Is Fraud.—This section clearly means that there shall at least be no imprisonment to enforce the payment of a debt under final process, unless it has been adjudged, upon an allegation duly made in the complaint and a corresponding issue found by a jury, that there has been fraud. *Ledford v. Emerson*, 143 N.C. 527, 55 S.E. 969, 10 L.R.A. (n.s.) 362 (1906); *East Coast Fertilizer Co v. Hardee*, 211 N.C. 653, 191 S.E. 725 (1937).

This constitutional provision against imprisonment for debt has been held to apply to debt in the strict sense of an obligation arising out of contract, and hence

would not apply to contracts involving fraud, including fraud in contracting the debt or incurring the obligation. *Nunn v. Smith*, 270 N.C. 374, 154 S.E.2d 497 (1967).

The words "except in cases of fraud," in this section of the Constitution, comprehend not only fraud in attempting to hinder, delay and defeat the collection of a debt by concealing property and other fraudulent devices, but embrace also fraud in making the contract — false representations, for instance, and fraud in incurring the liability; for instance, when an administrator commits a fraud by applying the funds of the estate to his own use, paying his own debts, and the like. *Melvin v. Melvin*, 72 N.C. 384 (1875). See further for arrests in cases of fraud, G.S. § 1-410, subdivision (4), and note thereto.

Imprisonment for failure to pay a sum of money is prohibited except to enforce an appropriate judicial order which has been willfully disobeyed so as to constitute contempt of court. *Stanley v. Stanley*, 226 N.C. 129, 37 S.E.2d 118 (1946).

A willful failure of a husband to comply with the court's order to pay to his wife an amount for support is a contempt, and can be punished as such by imprisonment and is not within the constitutional inhibition against imprisonment for debt. *Wilson v. Wilson*, 261 N.C. 40, 134 S.E.2d 240 (1964).

Suspension of Sentence on Condition That Defendant Pay Unrelated Civil Obligation.—To suspend a sentence of imprisonment for a criminal act, however just the sentence may be per se, on condition that the defendant pay obligations unrelated to such criminal act, however justly owing, is a use of the criminal process to enforce the payment of a civil obligation and lends itself to the oppressive action which this section is designed to forbid. To sustain the suspension of sentence upon such a condition would invite misuse of the practice of suspending sentence. It would substitute for the humane consideration and the objective reformation, upon which the practice ought to rest, an entirely different purpose. *State v. Caudle*, 276 N.C. 550, 173 S.E.2d 778 (1970).

The Worthless Check Law is a valid exercise by the State of its police powers. *State v. Yarboro*, 194 N.C. 498, 140 S.E. 216 (1927).

Section 14-110 Constitutional. — Section 14-110 of the General Statutes does not contravene this section of the Constitution. See note to § 14-110.

Section 14-358 Unconstitutional. — See note to G.S. § 14-358.

Sec. 29. *Treason against the State.* Treason against the State shall consist only of levying war against it or adhering to its enemies by giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court. No conviction of treason or attainder shall work corruption of blood or forfeiture.

Editor's Note.—The provisions of this section are similar to those of Art. I, § 37, Const. 1868, as amended in 1962.

Sec. 30. *Militia and the right to bear arms.* A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power. Nothing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice.

Cross Reference. — As to provisions of the General Statutes regulating concealed weapons, see G.S. §§ 14-269, 14-269.1 and the notes thereto.

Editor's Note.—The provisions of this section are similar to those of Art. I, § 24, Const. 1868, as amended by the Convention of 1875, and the cases in the following annotation were decided under that section.

This section guarantees the right to bear arms to the people in a collective sense—similar to the concept of a militia—and also to individuals. *State v. Dawson*, 272 N.C. 535, 159 S.E.2d 1 (1968).

The purpose of the constitutional guaranty of the right to bear arms is to secure a well-regulated militia. *State v. Dawson*, 272 N.C. 535, 159 S.E.2d 1 (1968).

The purpose of the declaration that a well-regulated militia is necessary to the security of a free state was to insure the existence of a State militia as an alternative to a standing army. Such armies were regarded as peculiarly obnoxious in any free government. *State v. Dawson*, 272 N.C. 535, 159 S.E.2d 1 (1968).

"Militia".—Militia is defined as the body of citizens in a state, enrolled for discipline as a military force, but not engaged in actual service except in emergencies, as distinguished from regular troops or a standing army. *State v. Dawson*, 272 N.C. 535, 159 S.E.2d 1 (1968).

Law Destroying Right to Bear Arms Would Be Unconstitutional.—Any statute, or construction of a common-law rule, which would amount to a destruction of the right to bear arms would be unconstitutional. *State v. Dawson*, 272 N.C. 535, 159 S.E.2d 1 (1968).

Individual Has Right to Possess Weapon.—The individual has the right, subject to reasonable regulation by the legislature, to possess a weapon in order to exercise his common-law right of self-defense. *State*

v. Dawson, 272 N.C. 535, 159 S.E.2d 1 (1968).

But Right Is Subject to Regulation.—The right of individuals to bear arms is not absolute, but is subject to regulation. *State v. Dawson*, 272 N.C. 535, 159 S.E.2d 1 (1968).

The right to bear arms, which is protected and safeguarded by the federal and State Constitutions, is subject to the authority of the General Assembly, in the exercise of the police power, to regulate, but the regulation must be reasonable and not prohibitive, and must bear a fair relation to the preservation of the public peace and safety. *State v. Dawson*, 272 N.C. 535, 159 S.E.2d 1 (1968).

This provision of the Constitution plainly observes the distinction between the "right to keep and bear arms," and "the practice of carrying concealed weapons." The first, it is declared, shall not be infringed, while the latter may be prohibited. Even without this constitutional provision, the legislature may by law regulate the right to bear arms in a manner conducive to the public peace. *State v. Speller*, 86 N.C. 697 (1882), approved, *State v. Reams*, 121 N.C. 556, 27 S.E. 1004 (1897).

But see *State v. Kerner*, 181 N.C. 574, 107 S.E. 222 (1921), wherein it was said that the last clause of this provision constitutes an exception to the first and indicates the extent to which the right of the people to bear arms can be restricted; that is, the legislature can prohibit the carrying of concealed weapons, but no further.

This section does not license self-appointed vigilantes, extremist groups, hoodlums, or any persons whomsoever to arm themselves for the purpose of intimidating the people and then—so long as they flaunt those weapons—to roam with impunity to

the terror of the people. *State v. Dawson*, 272 N.C. 535, 159 S.E.2d 1 (1968).

Common-Law Offense Not Abrogated.—The constitutional guaranty of the right to bear arms, does not abrogate the com-

mon-law offense of going armed with unusual weapons to the terror of the people. *State v. Dawson*, 272 N.C. 535, 159 S.E.2d 1 (1968).

Sec. 31. *Quartering of soldiers.* No soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war but in a manner prescribed by law.

Editor's Note.—The provisions of this section are similar to those of Art. I, § 36, Const. 1868.

Sec. 32. *Exclusive emoluments.* No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services.

Cross Reference.—See G.S. § 45-21.34 and the note thereto.

Editor's Note.—The provisions of this section are similar to those of Art. I, § 7, Const. 1868, as amended in 1946, and the cases in the following annotation were decided under that section.

This section is a fundamental democratic principle of "equal rights and opportunities to all, special privileges to none." *Newman v. Watkins*, 208 N.C. 675, 182 S.E. 453 (1935) (dissenting opinion).

Any law which, purporting to operate on a particular class, places upon those engaged in the business in a portion of the State a burden for the privilege which is exercised freely and without additional charge by those engaged in the business in other parts of the State is arbitrary in classification because it discriminates within the class originally selected and extends to the latter a privilege and immunity not accorded to those who must, under the law, pay the additional exaction or quit the business. *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854, 128 A.L.R. 658 (1940).

Purpose.—In summarizing the purpose of this section the court in *Simonton v. Lanier*, 71 N.C. 498 (1874), speaking through Justice Bynum, says: "The wisdom and foresight of our ancestors is nowhere more clearly shown than in providing these fundamental safeguards against partial and class legislation, the insidious and ever-working foes of free and equal government."

Counties Not Within Purview of Section.—Counties, as political subdivisions of the State, do not seem to be within the purview of this section, considering the vast number of local legislative acts, including ABC laws in contradiction to the general prohibition law, which are passed each session by the General Assembly. *Mathis v. North Carolina*, 266 F. Supp. 841 (M.D.N.C. 1967).

This section does not preclude the legislature from making classifications and distinctions in the application of laws provided they are reasonable and just and not arbitrary. *Motley v. State Bd. of Barber Exmrs.*, 228 N.C. 337, 45 S.E.2d 550, 175 A.L.R. 253 (1947).

Obviously, this provision does not forbid all classifications of persons with reference to the imposition of legal duties and obligations. *State v. Knight*, 269 N.C. 100, 152 S.E.2d 179 (1967).

Motivation of Legislation.—The constitutional limitation contained in this section, has been frequently invoked by the Supreme Court to strike down legislation conferring special privileges not in consideration of public service; but where the motivation is for a public purpose and in the public interest, and does not confer exclusive privilege, legislation has been upheld. *Brumley v. Baxter*, 225 N.C. 691, 36 S.E.2d 281, 162 A.L.R. 930 (1945); *State v. Knight*, 269 N.C. 100, 152 S.E.2d 179 (1967).

The limitation of this section, like that of § 19 of this article, does not apply to an exemption from a duty imposed upon citizens generally if the purpose of the exemption is the promotion of the general welfare, as distinguished from the benefit of the individual, and if there is reasonable basis for the legislature to conclude that the granting of the exemption would be in the public interest. *State v. Knight*, 269 N.C. 100, 152 S.E.2d 179 (1967).

This section constitutes a specific constitutional prohibition against gifts of public money, and the legislature has no power to compel or even to authorize a municipal corporation to pay a gratuity to an individual to adjust a claim which the municipality is under no legal obligation to pay. *Brown v. Board of Comm'rs*, 223 N.C. 744, 28 S.E.2d 104 (1943).

The State cannot authorize a city to donate property, or to grant privileges to one class of citizens not enjoyed by all, except in consideration of public services. *Brumley v. Baxter*, 225 N.C. 691, 36 S.E.2d 281, 162 A.L.R. 930 (1945), citing *Brown v. Board of Comm'rs*, 223 N.C. 744, 28 S.E.2d 104 (1943).

An expenditure by a municipality for special training of a police officer does not grant an exclusive emolument or privilege to the officer contrary to this section. *Green v. Kitchin*, 229 N.C. 450, 50 S.E.2d 545 (1948), discussed in 27 N.C.L. Rev. 500.

A pension paid a governmental employee for long and efficient service is not an emolument which, by this section, cannot be paid. To the contrary, it is a deferred portion of the compensation earned for services rendered. *Great Am. Ins. Co. v. Johnson*, 257 N.C. 367, 126 S.E.2d 92 (1962).

Benefits received by State employees under the Retirement Fund are deferred payments of salary for services rendered, and therefore such payments do not offend this section of the State Constitution. *Bridges v. City of Charlotte*, 221 N.C. 472, 20 S.E.2d 825 (1942).

Allowances to which a member of the Teachers' and State Employees' Retirement System is entitled upon retirement constitute compensation for public services previously rendered and do not violate this section. *Harrill v. Teachers' & State Employees' Retirement Sys.*, 271 N.C. 357, 156 S.E.2d 702 (1967).

Loans to Students.—Chapter 1177, Session Laws of 1967, which authorizes the State Education Assistance Authority to issue revenue bonds and to use the proceeds therefrom for making loans to "residents of this State to enable them to obtain an education in an eligible institution," does not unconstitutionally authorize use of public funds in violation of this section. *State Educ. Assistance Authority v. Bank of Statesville*, 276 N.C. 576, 174 S.E.2d 551 (1970).

Statute including deputy sheriffs within term "employee" as used in *Workmen's Compensation Act* (G.S. § 97-2) is consonant with the provisions of this section. *Towe v. Yancey County*, 224 N.C. 579, 31 S.E.2d 754 (1944).

Statute conferring special privilege upon firemen held violation of this section. See note to G.S. § 97-53.

Services in the armed forces during war are "public services" within the meaning of this section. *Motley v. State Bd. of Barber Exmrs.*, 228 N.C. 337, 45 S.E.2d

550, 175 A.L.R. 253 (1947); *Brumley v. Baxter*, 225 N.C. 691, 36 S.E.2d 281, 162 A.L.R. 930 (1945).

Statute making certain war veterans eligible for license to practice barbering without being examined does not violate this section. *Motley v. State Bd. of Barber Exmrs.*, 228 N.C. 337, 45 S.E.2d 550, 175 A.L.R. 253 (1947).

Collecting from Only Those Tubercular Patients Who Can Pay.—The law makes no unconstitutional discrimination between classes when it charges all tubercular patients the same rate but actually collects from only those who can pay. *Graham v. Reserve Life Ins. Co.*, 274 N.C. 115, 161 S.E.2d 485 (1968).

Legislature Has Power to Grant Special Privilege to a Person to Facilitate Public Transportation.—Though, as a rule, a grant of a special privilege, not conferred upon persons generally, to a particular man for his own peculiar benefit, naming him, may be unconstitutional, the legislature unquestionably has the power, in order to provide for the public convenience or to facilitate transportation of persons and property, to confer on a designated person the right to build a bridge, or establish a ferry, with the power to charge tolls for the use of such crossings, and, in addition, to exempt the servant who may be placed in charge, from all public burdens. *State v. Womble*, 112 N.C. 862, 17 S.E. 491 (1893); *State v. Knight*, 269 N.C. 100, 152 S.E.2d 179 (1967).

Public Service Corporations.—The grant of a special charter to a railroad or other like corporation is not in conflict with this section of the Constitution, the decision in this State being to the effect that the charters of public service corporations come directly within the exception contained in this provision. *Reid v. Norfolk S.R.R.*, 162 N.C. 355, 78 S.E. 306 (1913). This principle will be applied in behalf of municipal corporations, an agency of the State, created for the benefit of the public. *Kornegay v. City of Goldsboro*, 180 N.C. 441, 105 S.E. 187 (1920).

Contract to Relieve Railway of Expense of Removing Tracks Held Valid.—The State Highway Commission agreed to appropriate a sum of money for the improvement of a city street upon condition that tracks and facilities of a street railway company be removed therefrom. The railway company was operating under a franchise having twenty more years to run, which provided that the railway company should save the city harmless from any damage resulting from the construction of its tracks. The city entered into

a contract with the railway company providing that in consideration of abandonment of its franchise along said street the city would acquire for it an alternate right-of-way and would remove the tracks from the street. The court held that the promise by the city to remove the tracks did not constitute a special emolument not in consideration of public service. *Boyce v. City of Gastonia*, 227 N.C. 139, 41 S.E.2d 355 (1947).

Private Corporations. — A provision in a charter of a warehouse corporation to the effect that such corporation shall not be liable for loss or damages not provided for in its warehouse receipt or contract, attempts to confer exclusive privileges and is therefore unconstitutional under this section. *A.H. Motley Co. v. Southern Finishing & Warehouse Co.*, 122 N.C. 347, 30 S.E. 3 (1898); *A.H. Motley Co. v. Southern Finishing & Warehouse Co.*, 124 N.C. 232, 32 S.E. 555 (1899).

A provision in a bank's charter allowing it to charge more than the legal rate of interest is void under this section of the Constitution, where no public services are rendered in consideration of the grant. *Simonton v. Lanier*, 71 N.C. 498 (1874).

Exempting corporations chartered prior to a certain date from the proscription against emptying into streams substances inimical to fish violates this section. *State v. Glidden Co.*, 228 N.C. 664, 46 S.E.2d 860 (1948).

Private Act Incorporating Bank and Authorizing Summary Judgment on Note. — As long ago as *President & Directors v. Taylor*, 6 N.C. 266 (1813), the court had before it the contention that this provision of the State Constitution made invalid a provision in a private act incorporating the Bank of Newbern, which authorized summary judgment and execution against one who defaulted in the payment of a note. The court said, "This objection will vanish when we reflect that this privilege is not a gift, but the consideration for it is the public good, to be derived to the citizens at large from the establishment of the bank." *State v. Knight*, 269 N.C. 100, 152 S.E.2d 179 (1967).

Public-Local Law as to Sale of Claims against Closed Banks Held Invalid. — Public-local laws providing that depositors of certain closed banks might sell their claims for deposits to persons indebted to the banks at the date of their closing, and that the liquidation agents of such banks should accept such purchased claims at their face value in payment of the purchasers' debts to the banks, were held unconstitutional and void, being in violation

of this section, in *Edgerton v. Hood*, 205 N.C. 816, 172 S.E. 481 (1934).

A local public law which provides that the provisions of G.S. § 44-14, should be read into private construction bonds, is in contravention of this section and § 31 of this article, the statute failing to operate uniformly and equally in giving special privilege to the residents of the particular county and imposing heavier burdens on certain sureties. *J.O. Plott Co. v. H.K. Ferguson Co.*, 202 N.C. 446, 163 S.E. 688 (1932).

The State Constitution forbids the granting of an exclusive license. *Durham v. North Carolina*, 395 F.2d 58 (4th Cir. 1968).

And the holder of a nonexclusive franchise has no monopoly, and cannot complain of competition from a publicly created utility system. Phrased another way, the creation by a state of a competing public utility does not amount to a "taking" compensable under the Fourteenth Amendment. *Durham v. North Carolina*, 395 F.2d 58 (4th Cir. 1968).

An act authorizing the grant of an exclusive franchise to operate a race track was held unconstitutional as being in violation of this section. *State ex rel. Taylor v. Carolina Racing Ass'n*, 241 N.C. 80, 84 S.E.2d 390 (1954), commented on in 33 N.C.L. Rev. 109 (1954).

The exclusive privilege granted to the holder of a franchise to operate a dog race track under a statute is not in consideration of public service within the meaning of this section, and the statute is unconstitutional. *State v. Felton*, 239 N.C. 375, 80 S.E.2d 625 (1954). This is true notwithstanding a municipality receives a fraction of the gross receipts of such operation. *State ex rel. Taylor v. Carolina Racing Ass'n*, 241 N.C. 80, 84 S.E.2d 390 (1954), commented on in 33 N.C.L. Rev. 109 (1954).

Regulation as to Practice of Medicine.

—An act prohibiting the practice of medicine without registration is not brought within the inhibition of this section of the Constitution because it contains a proviso to the effect that the act shall not apply to midwives nor to nonresident consulting physicians, as this does not constitute an exclusive privilege within the meaning of the section. *State v. Van Doran*, 109 N.C. 864, 14 S.E. 32 (1891). See also *State v. Biggs*, 133 N.C. 729, 46 S.E. 401 (1903).

Regulation as to Pilots.—The selection by a commission of persons qualified to act as pilots is not violative of this section. *St. George v. Hardie*, 147 N.C. 88, 60 S.E. 920 (1908).

Regulation of Vehicles for Hire.—A municipal ordinance requiring all operators of passenger motor vehicles for hire within the city to deposit with the treasurer of the city policies of liability insurance in responsible companies authorized to do business in the State in a stipulated amount for each car operated, or cash or securities in the sum required, is in contravention of this section and § 34 of this article, in that the ordinance fails to provide that the security required might be furnished by one or more solvent individual sureties. *State v. Sasseen*, 206 N.C. 644, 175 S.E. 142 (1934). See 13 N.C.L. Rev. 222, for a note on this case.

Statute Providing for Tile Contractor's License.—Section 87-28 et seq. of the General Statutes, requiring a license for any person, firm or corporation undertaking to lay, set or install ceramic tile, marble or terrazzo floors or walls, violates this section. *Roller v. Allen*, 245 N.C. 516, 96 S.E.2d 851 (1957).

"Grandfather Clause" in Statute Authorizing Counties to Grant Franchises to Ambulance Operators.—Paragraph a 2 of G.S. § 153-9 (58) is unconstitutional since, because of the possible retroactive application of the grandfather rights provided for, it invades the personal and property rights guaranteed and protected by Art. I, §§ 1, 19, 32 and 34 of the Constitution. *Whaley v. Lenoir County*, 5 N.C. App. 319, 168 S.E.2d 411 (1969).

Sec. 33. *Hereditary emoluments and honors.* No hereditary emoluments, privileges, or honors shall be granted or conferred in this State.

Editor's Note.—The provisions of this section are similar to those of Art. I, § 30, Const. 1868.

Sec. 34. *Perpetuities and monopolies.* Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed.

Cross Reference.—See § 32 of this article and note thereto.

Editor's Note.—The provisions of this section are similar to those of Art. I, § 31, Const. 1868, and the cases in the following annotation were decided under that section.

This section is a fundamental democratic principle of "equal rights and opportunities to all, special privileges to none." *Newman v. Watkins*, 208 N.C. 675, 182 S.E. 453 (1935) (dissenting opinion).

The common-law rule against perpetuities is recognized and enforced in this State. The rule is not one of construction but a positive mandate of law to be obeyed irrespective of the question of intention. Its primary purpose is to restrict the per-

County Ordinance Regulating Ambulance Service Unconstitutional.—See *Whaley v. Lenoir County*, 5 N.C. App. 319, 168 S.E.2d 411 (1969).

Statute Granting Counties Power to Set Minimum Limits of Insurance Coverage for Ambulances.—Paragraph a 6 of G.S. § 153-9 (58), granting to counties the power to "set minimum limits of liability insurance coverage for ambulances," is not void as being in contravention of constitutional prohibitions against monopolies and exclusive emoluments, since the paragraph does not provide that liability insurance shall be the exclusive method of indemnifying persons or property against loss due to negligent operation of the ambulance service. *Whaley v. Lenoir County*, 5 N.C. App. 319, 168 S.E.2d 411 (1969).

Maintenance of Market House.—It is within the power of a city or town to provide, by contract with its citizens, a market house, and to exclude, with certain reasonable exceptions, the sale of fish at other places, it appearing that, under the contract, the market house was to remain under the full control of the municipal authorities, and that reasonable accommodation had been provided for the vendors, with reasonable charges for the stalls. *State v. Perry*, 151 N.C. 661, 65 S.E. 915 (1909).

Milk Commission Act and Order Pursuant Thereto.—See note to G.S. § 106-266.8.

missible creation of future interests and prevent undue restraint upon or suspension of the right of alienation. Whenever the future interest takes effect, or the right of alienation is suspended beyond the period stipulated in the rule, it is violative thereof. *Mercer v. Mercer*, 230 N.C. 101, 52 S.E.2d 229 (1949); *Parker v. Parker*, 252 N.C. 399, 113 S.E.2d 899 (1960).

Early Vesting of Estates Favored.—Where, by a correct interpretation of the will, it will reasonably be allowed, the law will favor the early vesting of estates against the interests of a contingent remainderman. *Walker v. Trollinger*, 192 N.C. 744, 135 S.E. 871 (1926).

The rule against perpetuities applies to private trusts. And when a private trust

violates the rule the court will not limit the duration of the trust but will declare the whole trust invalid. *Mercer v. Mercer*, 230 N.C. 101, 52 S.E.2d 229 (1949), holding devise of property in trust void because violative of rule.

Statute Failing to Provide for Successors to Office Does Not Create Perpetuity.—The General Assembly having failed to appoint or provide for the election of successors to the highway and sinking fund commissioners of Madison County, who were appointed for a four or six-year term by c. 341, Public-Local Laws of 1931, the General Assembly is presumed to acquiesce in their continuance in office, and the General Assembly having power to terminate, change or continue the appointments, it will not be held that it intended to create perpetuities or exclusive emoluments in violation of any of the provisions of this article, and said commissioners continue to hold office with power to discharge the duties thereof. *Freeman v. Board of County Comm'rs*, 217 N.C. 209, 7 S.E.2d 354 (1940).

The State Constitution forbids the granting of an exclusive license. *Durham v. North Carolina*, 395 F.2d 58 (4th Cir. 1968).

And the holder of a nonexclusive franchise has no monopoly, and cannot complain of competition from a publicly created utility system. Phrased another way, the creation by a state of a competing public utility does not amount to a "taking" compensable under the Fourteenth Amendment. *Durham v. North Carolina*, 395 F.2d 58 (4th Cir. 1968).

An act authorizing the grant of an exclusive franchise to operate a race track was held unconstitutional as being in violation of this section. *State ex rel. Taylor v. Carolina Racing Ass'n*, 241 N.C. 80, 84 S.E.2d 390 (1954).

An act which provided for the granting of an exclusive franchise to operate a dog race track was held unconstitutional in *State v. Felton*, 239 N.C. 575, 80 S.E.2d 625 (1954).

Prohibitive Regulations upon Engaging in Business.—See *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854, 128 A.L.R. 658 (1940).

Statute Providing for Tile Contractor's License.—Section 87-28 et seq. of the General Statutes, requiring a license for any person, firm or corporation undertaking to lay, set or install ceramic tile, marble or terrazzo floors or walls, violates this section. *Roller v. Allen*, 245 N.C. 516, 96 S.E.2d 851 (1957).

Statute Requiring Examination of Former Dentists Returning to State Is Valid.

—Section 90-38 of the General Statutes providing that a licensed dentist who retires or removes from the State must pass an examination upon returning to the State does not confer exclusive emoluments and privileges on continuously practicing dentists contrary to the provisions of this section and § 33 of this article. *Allen v. Carr*, 210 N.C. 513, 187 S.E. 809 (1936).

Statute Regulating Practice of Optometry.—A portion of G.S. § 90-115, relating to the practice of optometry, was held violative of this section. *Palmer v. Smith*, 229 N.C. 612, 51 S.E.2d 8 (1948).

Statute relating to licensing and supervision of photographers tends to create a monopoly in violation of this section. *State v. Ballance*, 229 N.C. 764, 51 S.E.2d 731 (1949).

Statute Granting Counties Power to Set Minimum Limits of Insurance Coverage for Ambulances.—Paragraph a 6 of G.S. § 153-9 (58) is not void as being in contravention of constitutional prohibitions against monopolies and exclusive emoluments, since the paragraph does not provide that liability insurance shall be the exclusive method of indemnifying persons or property against loss due to negligent operation of the ambulance service. *Whaley v. Lenoir County*, 5 N.C. App. 319, 168 S.E.2d 411 (1969).

"Grandfather Clause."—Because of the possible retroactive application of the grandfather rights provided for, paragraph a 2 of G.S. § 153-9 (58) is unconstitutional, since it invades the personal and property rights guaranteed and protected by Art. I, §§ 1, 19, 32 and 34 of the Constitution. *Whaley v. Lenoir County*, 5 N.C. App. 319, 168 S.E.2d 411 (1969).

County Ordinance Regulating Ambulance Service Unconstitutional.—See *Whaley v. Lenoir County*, 5 N.C. App. 319, 168 S.E.2d 411 (1969).

Miscellaneous Cases. — Selection by a commission of persons qualified to act as pilots, *St. George v. Hardie*, 147 N.C. 88, 60 S.E. 920 (1908); ordinance granting the exclusive privilege to construct and maintain waterworks within the corporate limits of the town, *Elizabeth City Water & Power Co. v. City of Elizabeth City*, 188 N.C. 278, 124 S.E. 611 (1924); in *Standard Oil Co. v. United States*, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911), and *United States v. American Tobacco Co.*, 221 U.S. 106, 31 S. Ct. 632, 55 L. Ed. 663 (1911), stipulations in partial restraint of trade were held not to be obnoxious to the law unless they were unreasonable and likely to be-

come monopolies, which are obnoxious to this section, Tobacco Growers Cooperative Ass'n v. Jones, 185 N.C. 265, 117 S.E. 174, 33 A.L.R. 231 (1923); North Carolina Fair Trade Act, Ely Lilly & Co. v. Saunders, 216 N.C. 163, 4 S.E.2d 528, 125 A.L.R.

1308 (1939); police power to regulate those engaged in the business of operating cleaning and pressing plants, State v. Harris, 216 N.C. 746, 6 S.E.2d 854, 128 A.L.R. 658 (1940).

Sec. 35. *Recurrence to fundamental principles.* A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty.

Editor's Note.—The provisions of this section are similar to those of Art. I, § 29, Const. 1868, and the cases in the following annotation were decided under that section.

Liberal Construction.—The Constitution must be construed in the light of its history, and must be liberally construed in aid of progress, but a liberal construction is especially required in interpreting those provisions safeguarding individual liberty. State v. Harris, 216 N.C. 746, 6 S.E.2d 854, 128 A.L.R. 658 (1940).

Application of Section. — This section was applied in State v. Hardy, 189 N.C. 799, 128 S.E. 152 (1925), as to conviction, in

a criminal action, of defendant except by the law of the land or under a unanimous verdict of guilty by the jury, and as to presumption of innocence upon denial of guilt, with the statutory right to request to go on the stand as a witness in his own behalf, in not exercising which no prejudice shall be created against him, and as to the further right to have counsel for his defense who may argue the matters of law as well as of fact to the jury; and as to defendant's right to have the trial judge in his instructions to the jury not give his opinion whether a fact is fully or sufficiently proven.

Sec. 36. *Other rights of the people.* The enumeration of rights in this Article shall not be construed to impair or deny others retained by the people.

Editor's Note.—The provisions of this section are similar to those of Art. I, § 38, Const. 1868, as amended in 1962.

Default Judgment Restraining Pastor from Appearing at Church. — See same catchline under § 1 of this article.

ARTICLE II LEGISLATIVE

Section 1. *Legislative power.* The legislative power of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives.

Editor's Note.—The provisions of this section are similar to those of Art. II, § 1, Const. 1868, and the cases in the following annotation were decided under that section.

For note on delegation of legislative authority to individuals, see 31 N.C.L. Rev. 308 (1953). For case law survey as to separation of powers, see 44 N.C.L. Rev. 947 (1966).

It is fundamental that all legislative power in this State rests in the General Assembly under this section, except as authorized by the Constitution, as in cases of municipal corporations. Redevelopment Comm'n v. Security Nat'l Bank, 252 N.C. 595, 114 S.E.2d 688 (1960).

Legislative power vests exclusively in the General Assembly, and except as authorized by the Constitution, as in case of municipal corporations, may not be delegated. Gardner v. City of Reidsville, 269 N.C. 581, 153 S.E.2d 139 (1967).

Only Legislature May Amend Statute.—Only the General Assembly may amend or

rewrite a statute. Ramsey v. North Carolina Veterans Comm'n, 261 N.C. 645, 135 S.E.2d 659 (1964).

Legislative function cannot be delegated. Cox v. City of Kinston, 217 N.C. 391, 8 S.E.2d 252 (1940).

The legislature may not abdicate its power to make laws nor delegate its supreme legislative power to any other coordinate branch or to any agency which it may create. North Carolina Tpk. Authority v. Pine Island, Inc., 265 N.C. 109, 143 S.E.2d 319 (1965); State Educ. Assistance Authority v. Bank of Statesville, 276 N.C. 576, 174 S.E.2d 551 (1970).

This section inhibits the General Assembly from delegating its legislative powers to any other department or body. Jackson v. Guilford County Bd. of Adjustment, 2 N.C. App. 408, 163 S.E.2d 265 (1968).

Legislature May Delegate Portion of Power under Prescribed Standards. — As to some specific subject matter, the legis-

lature may delegate a limited portion of its legislative power to an administrative agency if it prescribes the standards under which the agency is to exercise the delegated powers. *North Carolina Tpk. Authority v. Pine Island, Inc.*, 265 N.C. 109, 143 S.E.2d 319 (1965); *State Educ. Assistance Authority v. Bank of Statesville*, 276 N.C. 576, 174 S.E.2d 551 (1970).

But It Cannot Delegate Absolute Discretion to Apply or Withhold Application of Law. — The legislature cannot vest in a subordinate agency the power to apply or withhold the application of the law in its absolute or unguided discretion. *Carolina-Virginia Coastal Highway v. Coastal Tpk. Authority*, 237 N.C. 52, 74 S.E.2d 310 (1953).

It Must Declare Policy, Fix Legal Principles and Provide Adequate Standards. — The legislative body must declare the policy of the law, fix legal principles which are to control in given cases, and provide adequate standards for the guidance of the administrative body or officer empowered to execute the law. *Carolina-Virginia Coastal Highway v. Coastal Tpk. Authority*, 237 N.C. 52, 74 S.E.2d 310 (1953).

But Administrative Details May Be Left to Agency. — If it were necessary for the Turnpike Authority to formulate specific plans as to the course of the turnpike through the various municipalities, and as to the manner and method of construction and then seek legislative approval thereof, there would be no purpose in creating the Authority; the legislature might just as well act itself in the entire matter. The prohibition against abdication of legislative power in favor of an agency was never intended to extend to such administrative details. *North Carolina Tpk. Authority v. Pine Island, Inc.*, 265 N.C. 109, 143 S.E.2d 319 (1965).

Legislature May Delegate Power to Determine Facts. — The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some facts or state of facts upon which the law makes, or intends to make, its own action depend. *State v. Curtis*, 230 N.C. 169, 52 S.E.2d 364 (1949).

While the legislature may not delegate its power to make laws, it may delegate to local political subdivisions the power to find facts determinative of whether a particular law should become effective in the locality, and therefore it may delegate to county commissioners the power to establish a county court when necessary in the public interest, and, a fortiori it may also delegate to the county commissioners sim-

ilar authority to abolish a county court established by the legislature. *Efrd v. Board of Comm'rs*, 219 N.C. 96, 12 S.E.2d 889 (1941).

The legislature may not abdicate its power to make laws or delegate its supreme legislative power to any other department or body. However, it is not necessary for the legislature to ascertain the facts of, or to deal with, each case. The constitutional inhibition against delegating legislative authority does not deny to the legislature the necessary flexibility of enabling it to lay down policies and establish standards, while leaving to designated governmental agencies and administrative boards the determination of facts to which the policy as declared by the legislature shall apply. *Carolina-Virginia Coastal Highway v. Coastal Tpk. Authority*, 237 N.C. 52, 74 S.E.2d 310 (1953).

The General Assembly, for the purpose of carrying its enactment into effect, may delegate the power to find facts or to determine the existence or nonexistence of a factual situation or condition on which the operation of a law is made to depend or another agency of the government is to come into existence, provided adequate standards are set forth to guide the agency in so doing. *Redevelopment Comm'n v. Security Nat'l Bank*, 252 N.C. 595, 114 S.E.2d 688 (1960).

Delegation of Power to Voters of Municipality. — Legislative power vests exclusively in the General Assembly, and, except as authorized by the Constitution, as in case of municipal corporations, may not be delegated. While an act, otherwise valid, may be enacted so as to take effect upon approval by a majority of the qualified voters of the affected locality, the General Assembly cannot constitutionally provide that the qualified voters in one governmental unit, e.g., a town, shall decide whether a statute shall be in force and effect elsewhere than in the territory comprising that particular governmental unit. *State ex rel. Taylor v. Carolina Racing Ass'n*, 241 N.C. 80, 84 S.E.2d 390 (1954).

Legislative power vests exclusively in the General Assembly, and except as authorized by the Constitution, as in case of municipal corporations, may not be delegated. An act, otherwise valid, may be enacted so as to take effect upon approval by a majority of the qualified voters of the affected locality. *Gardner v. City of Reidsville*, 269 N.C. 581, 153 S.E.2d 139 (1967).

Laws Providing for Incorporation of Municipal Corporations. — Ordinarily no dele-

gation of legislative functions is involved in general laws providing for the incorporation of municipal corporations, fixing the conditions on which they may be created, and leaving to some officer or official body the duty of determining whether such conditions exist. However if the statute requires or authorizes the court or other agency to pass upon questions of public policy involved, or to exercise any discretion as to whether the municipal corporation should be created, or to render any other assistance than the determination of facts, there is an attempted delegation of legislative power and the statute is invalid. *Carolina-Virginia Coastal Highway v. Coastal Tpk. Authority*, 237 N.C. 52, 74 S.E.2d 310 (1953).

Power to Adopt Zoning Ordinance May Be Conferred. — The General Assembly may, notwithstanding this section, confer upon county boards of commissioners power to adopt zoning ordinances otherwise valid. *Jackson v. Guilford County Bd. of Adjustment*, 275 N.C. 155, 166 S.E.2d 78 (1969).

As May Power to Legislate Concerning Local Problems. — The authority of the General Assembly to delegate to municipal corporations power to legislate concerning local problems, such as zoning, is an exception (established by custom in most, if not all, of the states) to the general rule that legislative powers, vested in the General Assembly by this section, may not be delegated by it. This exception to the doctrine of nondelegation is not limited to a delegation of such legislative authority to incorporated cities and towns, but extends, as to other types of local matters, to a like delegation to counties and other units established by the General Assembly for local government. *Jackson v. Guilford County Bd. of Adjustment*, 275 N.C. 155, 166 S.E.2d 78 (1969).

The North Carolina Fair Trade Act is not unconstitutional as a delegation of legislative authority, since the act is complete in itself and requires no action on the part of any agency to put it into operation. *Ely Lilly & Co. v. Saunders*, 216 N.C. 163, 4 S.E.2d 528, 125 A.L.R. 1308 (1939).

The North Carolina Turnpike Authority Act, G.S. §§ 136-89.59 to 136-89.77, did not violate this section. *North Carolina Tpk.*

Authority v. Pine Island, Inc., 265 N.C. 109, 143 S.E.2d 319 (1965).

The Urban Redevelopment Law does not confer any illegal delegation of legislative power upon petitions in violation of this section. *Horton v. Redevelopment Comm'n*, 259 N.C. 605, 131 S.E.2d 464 (1963).

The Urban Redevelopment Law is a constitutional delegation of power by the State to municipal corporations. *Horton v. Redevelopment Comm'n*, 259 N.C. 605, 131 S.E.2d 464 (1963).

Standards Must Be Set Up for Administrative Board. — Chapter 30, Public Laws of 1937, as amended by c. 337, Public Laws of 1939, providing for the licensing of those engaged in the business of dry cleaning by the commission set up in the act, is an unconstitutional delegation of legislative authority, in that the act fails to set up the standards or provide reasonable limitations to guide the administrative board in admitting or excluding persons from the business, but leaves such power in unlimited discretion of the administrative board. *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854, 128 A.L.R. 658 (1940).

Industrial Commission May Award Compensation for Bodily Disfigurement. — Section 97-31 of the General Statutes authorizing the Industrial Commission to award compensation for bodily disfigurement is not void as a delegation of legislative authority. *Baxter v. W.H. Arthur Co.*, 216 N.C. 276, 4 S.E.2d 621 (1939).

Chapter 1177, Session Laws of 1967, which authorizes the State Education Assistance Authority to issue revenue bonds and to use the proceeds therefrom for the making of loans to "residents of this State to enable them to obtain an education in an eligible institution," as set forth in G.S. § 116-209.2, when supplemented by federal legislation, provides sufficient legislative standards whereby the Authority can determine to which students the loans should be made, since it is implicit in chapter 1177 that all loans made from the bond proceeds shall be made in compliance with the standards of federal legislation which supplement the loan program of the Authority. *State Educ. Assistance Authority v. Bank of Statesville*, 276 N.C. 576, 174 S.E.2d 551 (1970).

Sec. 2. Number of Senators. The Senate shall be composed of 50 Senators, biennially chosen by ballot.

Editor's Note. — The provisions of this section are similar to those of Art. II, § 3, Const. 1868.

Sec. 3. *Senate districts; apportionment of Senators.* The Senators shall be elected from districts. The General Assembly, at the first regular session convening after the return of every decennial census of population taken by order of Congress, shall revise the senate districts and the apportionment of Senators among those districts, subject to the following requirements:

(1) Each Senator shall represent, as nearly as may be, an equal number of inhabitants, the number of inhabitants that each Senator represents being determined for this purpose by dividing the population of the district that he represents by the number of Senators apportioned to that district;

(2) Each senate district shall at all times consist of contiguous territory;

(3) No county shall be divided in the formation of a senate district;

(4) When established, the senate districts and the apportionment of Senators shall remain unaltered until the return of another decennial census of population taken by order of Congress.

Editor's Note. — The provisions of this section are similar to those of Art. II, § 4, Const. 1868, as amended in 1872-3 and 1968, and the cases in the following annotation were decided under that section.

Reapportionment is a political question

Sec. 4. *Number of Representatives.* The House of Representatives shall be composed of 120 Representatives, biennially chosen by ballot.

Cross Reference. — See note to § 5 of this article.

Editor's Note. — The provisions of this

and not a judicial one. *Leonard v. Maxwell*, 216 N.C. 89, 3 S.E.2d 316 (1939).

Unconstitutional Apportionment. — See *Drum v. Seawell*, 249 F. Supp. 877 (M.D. N.C. 1965), *aff'd*, 383 U.S. 831, 86 S. Ct. 1237, 16 L. Ed. 2d 298 (1966).

section are similar to those of Art. II, § 5, Const. 1868, as amended in 1872-3, 1962 and 1968.

Sec. 5. *Representative districts; apportionment of Representatives.* The Representatives shall be elected from districts. The General Assembly, at the first regular session convening after the return of every decennial census of population taken by order of Congress, shall revise the representative districts and the apportionment of Representatives among those districts, subject to the following requirements:

(1) Each Representative shall represent, as nearly as may be, an equal number of inhabitants, the number of inhabitants that each Representative represents being determined for this purpose by dividing the population of the district that he represents by the number of Representatives apportioned to that district;

(2) Each representative district shall at all times consist of contiguous territory;

(3) No county shall be divided in the formation of a representative district;

(4) When established, the representative districts and the apportionment of Representatives shall remain unaltered until the return of another decennial census of population taken by order of Congress.

Cross Reference. — For implementing statute, see G.S. § 120-2.

Editor's Note. — The provisions of this section are similar to those of Art. II, § 6, Const. 1868, as amended in 1968. The case cited in the following annotation construed that section and Art. II, § 5, Const. 1868, as amended, which corresponded to § 4 of this article.

Obligation of the State is to apportion as nearly equally as possible on a population based representation, and even minor deviations must be free from any taint of arbitrariness or discrimination. *Drum v. Seawell*, 249 F. Supp. 877 (M.D.N.C. 1965), *aff'd*, 383 U.S. 831, 86 S. Ct. 1237, 16 L. Ed. 2d 298 (1966).

Statistical Tests Used in Evaluating State's Efforts at Equal Apportionment.—The Supreme Court, while rejecting a rigid

application of a mathematical formula, has laid down two statistical tests in evaluating the State's "honest and good faith effort to construct districts as nearly of equal population as is practicable." First, the minimum controlling percentage, i.e., the percentage of the State's population which resides in the least populous districts which can elect a majority of each House; and second, the population variance ratio, i.e., the ratio between the most populous district and the least populous district of the State. *Drum v. Seawell*, 249 F. Supp. 877 (M.D.N.C. 1965), *aff'd*, 383 U.S. 831, 86 S. Ct. 1237, 16 L. Ed. 2d 298 (1966).

Guide Lines to Assist Lower Courts in Implementing Constitutional Guaranties of Suffrage.—The equal protection clause requires substantially equal representation for all citizens in a state in each of the two

houses of a state bicameral legislature. This right may not be debased by weighing votes differently according to where a citizen happens to reside. Representation in state legislative bodies must be, as nearly as practicable, apportioned on districts of equal population though mechanical exactness is not required. Political subdivisions may be recognized but not at the cost of substantial equality among the several districts. Considerations of history, economic or other group interests or area alone do

not justify substantial deviations from the equal population concept. Nor will the presence of large numbers of military and military related personnel justify the underrepresentation of an area. Discrimination against a class of individuals, merely because of the nature of their employment, without more being shown, is constitutionally impermissible. *Drum v. Seawell*, 249 F. Supp. 877 (M.D.N.C. 1965), *aff'd*, 383 U.S. 831, 86 S. Ct. 1237, 16 L. Ed. 2d 298 (1966).

Sec. 6. *Qualifications for Senator.* Each Senator, at the time of his election, shall be not less than 25 years of age, shall be a qualified voter of the State, and shall have resided in the State as a citizen for two years and in the district for which he is chosen for one year immediately preceding his election.

Editor's Note. — The provisions of this section are similar to those of Art. II, § 7, Const. 1868.

Sec. 7. *Qualifications for Representative.* Each Representative, at the time of his election, shall be a qualified voter of the State, and shall have resided in the district for which he is chosen for one year immediately preceding his election.

Editor's Note. — The provisions of this section are similar to those of Art. II, § 8, Const. 1868, as amended in 1968.

Sec. 8. *Elections.* The election for members of the General Assembly shall be held for the respective districts in 1972 and every two years thereafter, at the places and on the day prescribed by law.

Editor's Note. — The provisions of this section are similar to those of Art. II, § 27, Const. 1868, as amended by the Convention of 1875 and in 1968.

Sec. 9. *Term of office.* The term of office of Senators and Representatives shall commence at the time of their election.

Editor's Note. — The provisions of this section are similar to those of Art. II, § 25, Const. 1868, as amended by the Convention of 1875.

Sec. 10. *Vacancies.* Every vacancy occurring in the membership of the General Assembly by reason of death, resignation, or other cause shall be filled in the manner prescribed by law.

Editor's Note. — The provisions of this section are similar to those of Art. II, § 13, Const. 1868, as amended in 1952 and 1968.

Sec. 11. *Sessions.*

(1) *Regular sessions.* The General Assembly shall meet in regular session in 1973 and every two years thereafter on the day prescribed by law. Neither house shall proceed upon public business unless a majority of all of its members are actually present.

(2) *Extra sessions on legislative call.* The President of the Senate and the Speaker of the House of Representatives shall convene the General Assembly in extra session by their joint proclamation upon receipt by the President of the Senate of written requests therefor signed by three-fifths of all the members of the Senate and upon receipt by the Speaker of the House of Representatives of written requests therefor signed by three-fifths of all the members of the House of Representatives. (1969, c. 1270, s. 1.)

Cross Reference. — For statutory provision as to time of assembly, see G.S. § 120-11.1.

Editor's Note. — The provisions of subsection (1) of this section are similar to those of Art. II, § 2, Const. 1868, as

amended in 1872-3, by the Convention of 1875 and in 1956.

The amendment of this section adopted by vote of the people at the general election held Nov. 3, 1970, effective July 1,

1971, designated the provisions of this section as it appeared in Session Laws 1969, c. 1258, as subsection (1) and added subsection (2).

Sec. 12. *Oath of members.* Each member of the General Assembly, before taking his seat, shall take an oath or affirmation that he will support the Constitution and laws of the United States and the Constitution of the State of North Carolina, and will faithfully discharge his duty as a member of the Senate or House of Representatives.

Editor's Note. — The provisions of this section are similar to those of Art. II, § 24, Const. 1868.

Sec. 13. *President of the Senate.* The Lieutenant Governor shall be President of the Senate and shall preside over the Senate, but shall have no vote unless the Senate is equally divided.

Editor's Note. — The provisions of this section are similar to those of Art. II, § 19, Const. 1868.

Sec. 14. *Other officers of the Senate.*

(1) *President Pro Tempore - succession to presidency.* The Senate shall elect from its membership a President Pro Tempore, who shall become President of the Senate upon the failure of the Lieutenant Governor-elect to qualify, or upon succession by the Lieutenant Governor to the office of Governor, or upon the death, resignation, or removal from office of the President of the Senate, and who shall serve until the expiration of his term of office as Senator.

(2) *President Pro Tempore - temporary succession.* During the physical or mental incapacity of the President of the Senate to perform the duties of his office, or during the absence of the President of the Senate, the President Pro Tempore shall preside over the Senate.

(3) *Other officers.* The Senate shall elect its other officers.

Editor's Note. — The provisions of this section are similar to those of Art. II, § 20, Const. 1868, as amended in 1962.

Sec. 15. *Officers of the House of Representatives.* The House of Representatives shall elect its Speaker and other officers.

Editor's Note. — The provisions of this section are similar to those of Art. II, § 18, Const. 1868.

Sec. 16. *Compensation and allowances.* The members and officers of the General Assembly shall receive for their services the compensation and allowances prescribed by law. An increase in the compensation or allowances of members shall become effective at the beginning of the next regular session of the General Assembly following the session at which it was enacted.

Editor's Note. — The provisions of this section are similar to those of Art. II, § 28, Const. 1868, as added by the Convention of 1875 and amended in 1928, 1950, 1956 and 1968.

Sec. 17. *Journals.* Each house shall keep a journal of its proceedings, which shall be printed and made public immediately after the adjournment of the General Assembly.

Editor's Note. — The provisions of this section are similar to those of Art. II, § 16, Const. 1868.

Sec. 18. *Protests.* Any member of either house may dissent from and protest against any act or resolve which he may think injurious to the public or to any individual, and have the reasons of his dissent entered on the journal.

Editor's Note. — The provisions of this section are similar to those of Art. II, § 17, Const. 1868.

Sec. 19. *Record votes.* Upon motion made in either house and seconded by one fifth of the members present, the yeas and nays upon any question shall be taken and entered upon the journal.

Editor's Note. — The provisions of this section are similar to those of Art. II, § 26, Const. 1868.

Sec. 20. *Powers of the General Assembly.* Each house shall be judge of the qualifications and elections of its own members, shall sit upon its own adjournment from day to day, and shall prepare bills to be enacted into laws. The two houses may jointly adjourn to any future day or other place. Either house may, of its own motion, adjourn for a period not in excess of three days.

Editor's Note. — The provisions of the first two sentences of this section are similar to those of Art. II, § 22, Const. 1868, and the cases in the following annotation were decided under that section.

Effect of Section. — This section with-

draws from the consideration of the courts the question of title involved in a contest for a seat in the General Assembly. *State ex rel. Alexander v. Pharr*, 179 N.C. 699, 103 S.E. 8 (1920); *State ex rel. Bouldin v. Davis*, 197 N.C. 731, 150 S.E. 507 (1929).

Sec. 21. *Style of the acts.* The style of the acts shall be: "The General Assembly of North Carolina enacts:"

Editor's Note. — The provisions of this section are similar to those of Art. II, § 21, Const. 1868.

Sec. 22. *Action on bills.* All bills and resolutions of a legislative nature shall be read three times in each house before they become laws, and shall be signed by the presiding officers of both houses.

Editor's Note. — The provisions of this section are similar to those of Art. II, § 23, Const. 1868, and the cases in the following annotation were decided under that section.

Necessity for Signatures of Presiding Officers.—The signatures of the presiding officers, by the Constitution, must be affixed to an act of legislation during the session of the General Assembly, and are necessary to its completeness and efficacy. *State ex rel. Scarborough v. Robinson*, 81 N.C. 409 (1879).

Where an office was created by an act of the General Assembly which was not signed by the presiding officers until three days later, an election in the interim to fill such office was void. *State ex rel. Cook v. Meares*, 116 N.C. 582, 21 S.E. 973 (1895).

The judicial power cannot be exercised in aid of an unfinished and inoperative act, so left upon the final adjournment, any more than in obstructing legislative action. *State ex rel. Scarborough v. Robinson*, 81 N.C. 409 (1879).

In the absence of the signature journals are not competent to prove compliance with this section. *Frazier v. Board of Comm'rs*, 194 N.C. 49, 138 S.E. 433 (1927).

Ratification Certificates Are Conclusive as to Compliance with This Section.—The ratification certificates signed by the President of the Senate and the Speaker of the House are conclusive of the fact that the bill was read three times and was passed three times in each house of the General Assembly. *State ex rel. Dyer v. City of Leaksville*, 275 N.C. 41, 165 S.E.2d 201 (1969).

When an act is certified to by the speakers as having been ratified, it is conclusive of the fact that it was read three several times in each house and ratified. *Union Bank v. Commissioners of Oxford*, 119 N.C. 214, 25 S.E. 966 (1896).

The signature is conclusive of passage according to this section. *Frazier v. Board of Comm'rs*, 194 N.C. 49, 138 S.E. 433 (1927).

And the journals of the House and Senate are not competent evidence to contra-

dict the certificates of the presiding officers that a bill was duly read in each house three times and passed on each reading. *State ex rel. Dyer v. City of Leaksville*, 275 N.C. 41, 165 S.E.2d 201 (1969).

The journals are not admissible to contradict such signature. *Frazier v. Board of Comm'rs*, 194 N.C. 49, 138 S.E. 433 (1927).

But the certificate is not sufficient to show that the bill was passed in compliance with § 23 of this article. *Frazier v. Board of Comm'rs*, 194 N.C. 49, 138 S.E. 433 (1927).

The usual certificate of ratification is conclusive only of the fact of ratification, but not of a compliance with § 23 of this article. *Smathers v. Commissioners of Madison County*, 125 N.C. 480, 34 S.E. 554 (1899); *Commissioners of New Hanover County v. DeRosset*, 129 N.C. 275, 40 S.E. 43 (1901).

Sec. 23. Revenue bills. No law shall be enacted to raise money on the credit of the State, or to pledge the faith of the State directly or indirectly for the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities, or towns to do so, unless the bill for the purpose shall have been read three several times in each house of the General Assembly and passed three several readings, which readings shall have been on three different days, and shall have been agreed to by each house respectively, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the journal.

I. General Consideration.

II. Necessity of Following Section.

III. The Journal—Speakers' Certificates.

IV. Substituted Bills—Amendments.

I. GENERAL CONSIDERATION.

Editor's Note.—The provisions of this section are similar to those of Art. II, § 14, Const. 1868, and the cases in the following annotation were decided under that section.

This section is mandatory. *Union Bank v. Commissioners of Oxford*, 119 N.C. 214, 25 S.E. 966 (1896); *Commissioners of Stanly County v. Snuggs*, 121 N.C. 394, 28 S.E. 539 (1897); and must be strictly complied with. *Smathers v. Commissioners of Madison County*, 125 N.C. 480, 34 S.E. 554 (1899).

The adoption of this section annulled all special powers remaining unexecuted, and not granted in strict conformity with its requirements. *Commissioners of Buncombe County v. Payne*, 123 N.C. 432, 31 S.E. 711 (1898).

Burden of Proof of Compliance.—Parties objecting have the burden of showing that acts had not been passed according to the requirements of this section. *Slocumb v. City of Fayetteville*, 125 N.C. 362, 34 S.E. 436 (1899).

The additional steps necessary to show the passage of revenue acts are not within the conclusive presumption arising from the certificates of the presiding officers. The journals are made the exclusive sources of such proof. *State ex rel. Dyer v. City of Leaksville*, 275 N.C. 41, 165 S.E.2d 201 (1969).

Journals Are Conclusive as to Requirements of § 23.—With respect to the requirements in § 23 of this article, the House and Senate journals, and not the certificates of ratification signed by the presiding officers, are the sources of proof as to whether the bill was read on three several days in each house of the General Assembly and passed three several readings on three different days and that the yeas and nays on the second and third readings were entered on the journals. *State ex rel. Dyer v. City of Leaksville*, 275 N.C. 41, 165 S.E.2d 201 (1969).

Section Not Retroactive.—See *Board of Comm'rs v. Travelers' Ins. Co.*, 128 F. 817 (4th Cir. 1904).

It Applies to Townships.—The restrictions are by necessary implication applicable to townships, as they are but constituent parts of the county organization. *Wittkowsky v. Board of Comm'rs*, 150 N.C. 90, 63 S.E. 275 (1908); *Township Rd. Comm'n v. Board of Comm'rs*, 178 N.C. 61, 100 S.E. 122 (1919).

Section Not Applicable to Necessary County Expense.—It is not necessary to enter the yeas and nays on an act to raise revenue for a necessary county expense. *Black v. Commissioners of Buncombe County*, 129 N.C. 121, 39 S.E. 818 (1901).

Issuing bonds for road purposes is a necessary expense to which the section does not apply. *Leonard v. Board of Comm'rs*, 185 N.C. 527, 117 S.E. 580 (1923). See *Woodall v. Western Wake Highway Comm'n*, 176 N.C. 377, 97 S.E. 226 (1918).

Tolls and Taxes Distinguished.—Taxes are levied for the support of government, and their amount is regulated by its necessities. Tolls are the compensation for the use of another's property or improvements made, and their amount is determined by the cost of the property or improvements. *North Carolina Tpk. Authority v. Pine*

Island, Inc., 265 N.C. 109, 143 S.E.2d 319 (1965).

Tolls are not taxes. A person uses a toll road at his option; if he does not use it, he pays no toll. *North Carolina Tpk. Authority v. Pine Island, Inc.*, 265 N.C. 109, 143 S.E.2d 319 (1965).

Turnpike Authority Bonds Not Debt within Meaning of Constitution. — The General Assembly has taken great care to make it crystal clear that the credit of neither the State nor any of its political subdivisions can be pledged to pay the Turnpike Authority's revenue bonds. This method of financing creates no debt within the meaning of the Constitution. *North Carolina Tpk. Authority v. Pine Island, Inc.*, 265 N.C. 109, 143 S.E.2d 319 (1965).

An act authorizing treasurer to deliver State bonds is not within this section. *Battle v. Lacy*, 150 N.C. 573, 64 S.E. 505 (1909).

A statute for the revaluation of property is not in its strict sense a revenue act within the meaning of this section. *Hart v. Board of Comm'rs*, 192 N.C. 161, 134 S.E. 403 (1926).

The filing fee required by the primary law is in no sense a tax within the meaning of this section. *McLean v. Durham County Bd. of Elections*, 222 N.C. 6, 21 S.E.2d 842 (1942).

Changing of County Tax Agencies. — The legislature has the power and authority to change the county tax agencies without further observing the requirements of the section. *State ex rel. O'Neal v. Jenette*, 190 N.C. 96, 129 S.E. 184 (1925).

Submission to People Not Required. — An act of the legislature authorizing a bond issue for public roads is valid if conforming to this section of the State Constitution, without submitting the proposition to a vote of the people. *Hargrave v. Board of Comm'rs*, 168 N.C. 626, 84 S.E. 1044 (1915).

A motion to reconsider violates the efficacy of the original passage according to this section; for the act to be valid the final result must comply with this section. *Allen v. City of Raleigh*, 181 N.C. 453, 107 S.E. 463 (1921).

Section Complied with. — Passage of Session Laws 1961, c. 783, amending G.S. § 105-228.5, was held to meet the requirements of this section. *Great Am. Ins. Co. v. High*, 264 N.C. 752, 142 S.E.2d 681 (1965).

Chapter 967, Session Laws of 1967, was duly passed and is valid and binding. *State ex rel. Dyer v. City of Leaksville*, 275 N.C. 41, 165 S.E.2d 201 (1969).

II. NECESSITY OF FOLLOWING SECTION.

Act Is Void Unless Section Followed.

—An act not having been passed with the formalities required by this section is void, and confers no authority upon a city to create the debt and issue the bonds therein provided for. *City of Charlotte v. E.D. Shepard & Co.*, 122 N.C. 602, 29 S.E. 842 (1898); *Glenn v. Wray*, 126 N.C. 730, 36 S.E. 167 (1900); *Cottrell v. Town of Lenoir*, 173 N.C. 138, 91 S.E. 827 (1917).

Valid and Invalid Acts Not Construed Together.—An act passed according to the requirements of this section cannot be construed with an act not so passed. *Pritchard v. Board of Comm'rs*, 160 N.C. 476, 76 S.E. 488 (1912).

Where a town charter is not passed in accordance with this section, such town cannot levy any tax under said charter, but it may levy taxes for necessary expense. *Rodman-Heath Cotton Mills v. Town of Waxhaw*, 130 N.C. 293, 41 S.E. 488 (1902).

Effect on Bonds of Failure to Comply with Section.—This section is mandatory; and, not having been complied with in the passage of certain laws authorizing certain counties, to subscribe for stock in a railroad company and issue bonds in payment thereof, bonds issued by a city pursuant thereto were void. *Burlingham v. City of New Bern*, 213 F. 1014 (E.D.N.C. 1914).

A town may not pledge its faith or credit for the issuance of bonds for municipal purposes, unless under statutory authority given in conformity with the requirements of this section, or unless for necessary expenses. *Storm v. Town of Wrightsville Beach*, 189 N.C. 679, 127 S.E. 17 (1925).

Estoppel to Deny Invalidity of Bonds.—Where township bonds are invalid because issued without authority, the township is not estopped from asserting such fact by recitals in the bonds that they are issued in compliance with the Constitution and laws of the State. *Debnam v. Chitty*, 131 N.C. 657, 43 S.E. 3 (1902).

The payment of interest does not preclude the inquiry as to the validity of the bonds. *Glenn v. Wray*, 126 N.C. 730, 36 S.E. 167 (1900).

Who May Enjoin Bond Issue. — It is competent for a taxpayer to file a complaint on behalf of himself and all other taxpayers in the State, whereby to enjoin the issue of State bonds under an unconstitutional act of Assembly. *Galloway v. Jenkins*, 63 N.C. 147 (1869).

Readings on Same Day. — Where the journal of the State Senate affirmatively

shows that the first and second readings of a bill took place on the same day, the act is unconstitutional. *Storm v. Town of Wrightsville Beach*, 189 N.C. 679, 127 S.E. 17 (1925).

III. THE JOURNAL—SPEAKERS' CERTIFICATES.

Cross Reference.—See note under § 22 of this article.

What Journal Must Show.—The journal must show who voted for the bill, and that the requisite number of Senators and members did so, and no other source of evidence can be invoked, and the certificate of the presiding officers that a bill has been read three times does not obviate the necessity of examining the journal. *Burlingham v. City of New Bern*, 213 F. 1014 (E.D.N.C. 1914).

Omission of Negative Vote.—Where the journal of the house does not give the names of any members as voting in the negative on a bill authorizing a township to issue bonds, and it does not affirmatively appear that there were none so voting, the statute is invalid. *Debnam v. Chitty*, 131 N.C. 657, 43 S.E. 3 (1902).

As this section requires that on the voting of a bill before the legislature the yeas and nays shall be entered on the journals, either the nays must be on the journal, or it must affirmatively appear that there were none. *Commissioners of New Hanover County v. DeRosset*, 129 N.C. 275, 40 S.E. 43 (1901).

Where the house journal showed that a certain law, authorizing the issuance of county bonds, was passed by the following vote: "Ayes 94, nays . . . ; total . . ." — such record sufficiently showed that there was no negative vote cast, under the presumption that the clerk of the house charged with the recording of the vote performed his duty, and hence such record constituted a sufficient compliance with this section. *Board of Comm'rs v. Tollman*, 145 F. 753 (4th Cir. 1906).

A bill to authorize a county to pledge its faith and credit by issuing bonds for road purposes, and duly ratified, is not invalid for the failure to meet the requirements of this section, by reason of the failure to record on the journal on the second reading in one of the branches of the legislature the "no" vote, when it is made to appear from the entries of the names of those voting in the affirmative that a majority of the voters had so voted, the absence of the entries of the names of those voting in the negative showing that there were none. *Leonard v. Board of Comm'rs*, 185 N.C. 527, 117 S.E. 580 (1923),

citing *Board of Comm'rs v. Trust Co.*, 143 N.C. 110, 55 S.E. 442 (1906).

Journals Conclusive. — The journals of the General Assembly, when competent as evidence, import absolute verity, and cannot be explained or altered by parol evidence. *Wilson v. Markley*, 133 N.C. 616, 45 S.E. 1023 (1903). They are the sole evidence as to whether the yeas and noes on a vote on a bill were entered on such journals. *Commissioners of New Hanover County v. De Rosset*, 129 N.C. 275, 40 S.E. 43 (1901); *Allen v. City of Raleigh*, 181 N.C. 453, 107 S.E. 463 (1921); *Board of Comm'rs v. Coler*, 96 F. 284 (4th Cir. 1899). And are conclusive as against not only a printed statute published by authority of law, but also against a duly enrolled act. *Union Bank v. Commissioners of Oxford*, 119 N.C. 214, 25 S.E. 966 (1896); *Commissioners of Stanly County v. Snuggs*, 121 N.C. 394, 28 S.E. 539 (1897).

It appears from the journal of each house of the General Assembly that the last paragraph of G.S. § 153-152 was enacted in accordance with the requirements of this section. *Martin v. Board of Comm'rs*, 208 N.C. 354, 180 S.E. 777 (1935).

The Constitution requires that it should appear, not from the entries on the original bill, but from the journal that the bill was properly read and the necessary entry of yeas and nays was made. If the journal should show that bill was properly passed, no evidence will be received to contradict what is therein recorded. *State ex rel. Dyer v. City of Leaksville*, 275 N.C. 41, 165 S.E.2d 201 (1969).

With respect to the requirements in this section, the House and Senate journals, and not the certificates of ratification signed by the presiding officers, are the sources of proof as to whether the bill was read on three several days in each house of the General Assembly and passed three several readings on three different days and that the yeas and nays on the second and third readings were entered on the journals. *State ex rel. Dyer v. City of Leaksville*, 275 N.C. 41, 165 S.E.2d 201 (1969).

Correction of Journals. — A subsequent special session of the same legislature may correct its journals of the regular session so as to show in point of fact that a bill of this character was properly passed in accordance with these provisions. *Commissioners of Richmond County v. Farmers Bank*, 152 N.C. 387, 67 S.E. 969 (1910).

Effect of Certificate of Ratification. — The certificate of the speakers of each house of the legislature is conclusive evidence that a bill was read and passed three

several readings in each house. *Commissioners of New Hanover County v. DeRossett*, 129 N.C. 275, 40 S.E. 43 (1901).

The usual certificate of ratification is conclusive only of the fact of ratification, but not of a compliance with this section of the Constitution. *Smathers v. Commissioners of Madison County*, 125 N.C. 480, 34 S.E. 554 (1899).

The additional steps necessary to show the passage of revenue acts are not within the conclusive presumption arising from the certificates of the presiding officers. The journals are made the exclusive sources of such proof. *State ex rel. Dyer v. City of Leaksville*, 275 N.C. 41, 165 S.E.2d 201 (1969).

IV. SUBSTITUTED BILLS—AMENDMENTS.

In General.—Where a bill, authorizing a levy of taxes for road purposes, has been read, referred to a committee, and the committee has recommended a substitute, resulting in the tabling of the original bill and the passing of the substitute on two separate days in that branch of legislation, and otherwise conforming to the requirements of this section, in both branches of legislation, the substitute is to be regarded, in the contemplation of the Constitution, as an amendment to the original bill introduced, and the act may not successfully be questioned as not having passed on the several separate days required of a bill of this character. *Edwards v. Nash County Bd. of Comm'rs*, 183 N.C. 58, 110 S.E. 600 (1922).

Where a valid charter of a municipality authorizing the issuance of its bonds has been subsequently amended with regard thereto, but upon condition that the proposition be submitted to the voters, which was never done, and the legislature attempts to pass a still later law amending the former act but which has not been done in accordance with the requirements of this section, the later acts are of no effect, leaving the charter of the town as to these provisions open, under the terms of which the bonds may yet be issued. *Cottrell v. Town of Lenoir*, 173 N.C. 138, 91 S.E. 827 (1917).

Validation by Later Act.—Where a statute, pledging the faith and credit of the State in issuing State bonds, has not been passed in accordance with the provisions of this section is therefore invalid, its invalidity may be cured by a later statute passed as the Constitution requires, referring to the former statute, and supplying the omissions, and the bonds thereunder issued after the question has been sub-

mitted to and approved by the voters of the State, as the statute required, are valid. *Hinton v. Lacy*, 193 N.C. 496, 137 S.E. 669 (1927).

When Amendment Will Affect Constitutionality.—An act passed in accordance with this section is not rendered invalid by an amendment not passed in accordance with the constitutional provision, when it does not affect the taxing or other financial features of the act, or increase either the taxes or impose any additional burden on the taxpayer. *Wagstaff v. Central Highway Comm'n*, 174 N.C. 377, 93 S.E. 908 (1917).

Subsequent Act Requiring Referendum on Bond Issue.—Where the legislature has passed an act authorizing a county to pledge its faith and credit in the issuance of bonds upon its several readings, upon its aye and no vote in accordance with this section, and by later ratification of an act requiring the question to be submitted to the qualified voters, it is not required that the later ratified act be also passed in accordance with the constitutional requirement, and in the absence of a proper election, the bond issue will be declared invalid. *Graham County v. W.K. Terry & Co.*, 194 N.C. 22, 138 S.E. 443 (1927).

Where the legislature has passed an act authorizing a county to issue bonds according to the provisions of this section it is within its power to add a provision that the question be first submitted to the electorate of the county. *Graham County v. W.K. Terry & Co.*, 194 N.C. 22, 138 S.E. 443 (1927).

No Presumption of Materiality of Amendment.—Where the journal does not show the effect of the amendment there is no presumption that it was material. *Frazier v. Board of Comm'rs*, 194 N.C. 49, 138 S.E. 433 (1927).

Evidence of Materiality.—Slips of paper attached by a rubber band to the cover of the original bill when it was engrossed are not admissible in determining whether an amendment was material. *Frazier v. Board of Comm'rs*, 194 N.C. 49, 138 S.E. 433 (1927).

Material Amendments Generally.—A material amendment made by one branch of the legislature to a bill passed by the other, allowing a county to pledge its credit in issuing bonds for the improvement of the highways therein, must be concurred in according to the requirements of this section. *Glenn v. Wray*, 126 N.C. 730, 36 S.E. 167 (1900); *Claywell v. Board of Comm'rs*, 173 N.C. 657, 92 S.E. 481 (1917). This rule applies with greater force, when the amend-

ment is by separate act. *Guire v. Board of Comm'rs*, 177 N.C. 516, 99 S.E. 430 (1919).

An amendment which made a material change in the valid act it proposed to amend is unconstitutional, and the commissioners are without authority to levy the tax specified in the later act. *Township Rd. Comm'n v. Board of Comm'rs*, 178 N.C. 61, 100 S.E. 122 (1919).

Increasing Interest Rate. — An amendment to an act authorizing a county to issue bonds for road construction, which increases the rate of interest from 5 percent to 6 percent, is to effect a material change in the former law. *Guire v. Board of Comm'rs*, 177 N.C. 516, 99 S.E. 430 (1919).

Increasing Tax Rate. — When an act has been passed by the legislature authorizing a graded school district to vote on the question of issuing school bonds in a certain amount, and amended at a subsequent session so as to authorize bonds to a larger amount and to run a longer time, both acts having been passed upon their several readings, with aye and no vote according to this section, an issue of bonds under a still later and similar act for a larger amount and upon a greater rate of taxation is invalid in toto when the later act is not likewise passed in accordance with this section. *Russell v. Town of Troy*, 159 N.C. 366, 74 S.E. 1021 (1912).

The bonds are invalid even as to the amount authorized to be issued under the valid act, for that amount was only authorized at a less rate of taxation, etc., as to which the voters upon the proposition have not assented. *Russell v. Town of Troy*, 159 N.C. 366, 74 S.E. 1021 (1912).

Curtailling Territory to Which Indebtedness Applicable. — Where a bill is introduced in one branch of the legislature for the issuance of bonds, and amendments have been made by the other branch, withdrawing certain of the more wealthy and popular townships from the liability for the indebtedness to be created, except under condition requiring the approval of the voters, the amendment is a material one, requiring for the validity of the act that it be passed in accordance with the requirements of this section. *Claywell v. Board of*

Comm'rs, 173 N.C. 657, 92 S.E. 481 (1917).

But an act empowering special school districts of the State to issue bonds which followed the requirements of this section except that upon its last reading, by amendment, it was made to apply only to one district in the State, the effect of the amendment being to exclude the other districts, and the act being regularly enacted as to the one district retained, is valid as to that district. *Gregg v. Board of Comm'rs*, 162 N.C. 479, 78 S.E. 301 (1913).

Immaterial Amendments Generally. — When an act has been passed in accordance with this section, an amendment, which does not increase the amount of the bonds or the taxes to be levied or otherwise materially change the original bill, may be adopted by the concurrence of both houses of the General Assembly. *Board of Comm'rs v. Stafford*, 138 N.C. 453, 50 S.E. 862 (1905).

An amendment which does not increase the amount of the bonds or tax to be levied, or otherwise materially change the bill is immaterial. *Gregg v. Board of Comm'rs*, 162 N.C. 479, 78 S.E. 301 (1913).

It is only when a material amendment is affected that a rereading is necessary. *Frazier v. Board of Comm'rs*, 194 N.C. 49, 138 S.E. 433 (1927).

Substituting Name of Commissioner. — An amendment in the second branch of the legislature substituting the name of a commissioner does not broaden the scope of the act or affect its financial feature, and the failure in the first branch to comply with this section will not alone affect its validity. *Brown v. Road Comm'rs*, 173 N.C. 598, 92 S.E. 502 (1917).

Change in Caption. — A slightly different caption retaining the number of the original bill is an immaterial amendment. *Brown v. Road Comm'rs*, 173 N.C. 598, 92 S.E. 502 (1917).

Materiality a Judicial Question. — Whether an amendment is material and required to be passed in accordance with this section is a question of law for the court, under the facts, and not controlled by an agreement between the parties. *Wagstaff v. Central Highway Comm'n*, 174 N.C. 377, 93 S.E. 908 (1917).

Sec. 24. *Limitations on local, private, and special legislation.*

(1) *Prohibited subjects.* The General Assembly shall not enact any local, private, or special act or resolution:

- (a) Relating to health, sanitation, and the abatement of nuisances;
- (b) Changing the names of cities, towns, and townships;
- (c) Authorizing the laying out, opening, altering, maintaining, or discontinuing of highways, streets, or alleys;

- (d) Relating to ferries or bridges;
- (e) Relating to non-navigable streams;
- (f) Relating to cemeteries;
- (g) Relating to the pay of jurors;
- (h) Erecting new townships, or changing township lines, or establishing or changing the lines of school districts;
- (i) Remitting fines, penalties, and forfeitures, or refunding moneys legally paid into the public treasury;
- (j) Regulating labor, trade, mining, or manufacturing;
- (k) Extending the time for the levy or collection of taxes or otherwise relieving any collector of taxes from the due performance of his official duties or his sureties from liability;
- (l) Giving effect to informal wills and deeds;
- (m) Granting a divorce or securing alimony in any individual case;
- (n) Altering the name of any person, or legitimating any person not born in lawful wedlock, or restoring to the rights of citizenship any person convicted of a felony.

(2) *Repeals.* Nor shall the General Assembly enact any such local, private, or special act by the partial repeal of a general law; but the General Assembly may at any time repeal local, private, or special laws enacted by it.

(3) *Prohibited acts void.* Any local, private, or special act or resolution enacted in violation of the provisions of this Section shall be void.

(4) *General laws.* The General Assembly may enact general laws regulating the matters set out in this Section.

Editor's Note.—The provisions of this section, with the exception of subdivisions (m) and (n) of subsection (1), are similar to those of Art. II, § 29, Const. 1868, as added in 1916 and amended in 1962. The provisions of subdivision (m) of subsection (1) are similar to those of Art. II, § 10, Const. 1868, and the provisions of subdivision (n) of subsection (1) are similar to those of Art. II, § 11, Const. 1868. The cases in the following annotation were decided under Art. II, §§ 10 and 29, Const. 1868.

For note on constitutionality of local laws, see 36 N.C.L. Rev. 537 (1958).

For an article discussing the history and present vitality of this section, see 45 N.C.L. Rev. 340 (1967).

Purpose of Section.—It was the purpose of this section to free the General Assembly from the enormous amount of petty detail which had been occupying its attention to enable it to devote more time and attention to general legislation of statewide interest and concern, to strengthen local self-government by providing for the delegation of local matters by general laws to local authorities, and to require uniform and coordinated action under general laws on matters related to the welfare of the whole State. *High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 142 S.E.2d 697 (1965).

The purpose of this section was to re-

lieve the General Assembly from the necessity of passing on laws relating to certain specified matters in which only a small territory or a few persons were concerned, and to thereby enable members of the General Assembly to devote their time and attention to the enactment of legislation important to the entire State. *Gardner v. City of Reidsville*, 269 N.C. 581, 153 S.E.2d 139 (1967).

Effect of Section. — Formerly statutes imposing prohibitions, restrictions and burdens in certain localities, not in conflict with any general criminal statute dealing with the same subject matter, were upheld. See *State ex rel. Taylor v. Carolina Racing Ass'n*, 241 N.C. 80, 84 S.E.2d 390 (1954). The modification wrought by this section is that now a local, private or special act, dealing with designated subjects, is void as violative of this section of the organic law. *State v. Chestnutt*, 241 N.C. 401, 85 S.E.2d 297 (1955).

This section is remedial in its nature and was intended not only to free the legislature of petty detail but also to require uniform and coordinated action under general laws in regard to the matters therein stipulated which are related to the welfare of the people of the whole State, and the application of the section should not be denied on any unsubstantial distinction which would defeat its purpose. *Board of Health v. Board of Comm'rs*, 220 N.C. 140,

16 S.E.2d 677 (1941), holding Pub. Laws 1941, chs. 6 and 193, to be local laws relating to health.

In adopting this section, the people were motivated by the desire that the General Assembly should legislate for North Carolina in respect to the subjects specified as a single united commonwealth rather than as a conglomeration of innumerable discordant communities. To prevent this laudable desire from degenerating into a mere pious hope, they decreed in emphatic and express terms that "any local, private, or special act or resolution passed in violation of the provisions of this section shall be void," no matter how praiseworthy or wise such local, private, or special act or resolution may be. *Idol v. Street*, 233 N.C. 730, 65 S.E.2d 313 (1951).

Scope of Legislative Power.—See generally *Webb v. Port Comm'n*, 205 N.C. 663, 172 S.E. 377 (1934).

A statute is either "general" or "local"; there is no middle ground. *High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 142 S.E.2d 697 (1965); *Gardner v. City of Reidsville*, 269 N.C. 581, 153 S.E.2d 139 (1967).

What Are General Laws.—For a law to be general it is only required that the objects of its operation be reasonably classified. *McIntyre v. Clarkson*, 254 N.C. 510, 119 S.E.2d 888 (1961).

Statutes relating to persons or things as a class are general laws. *McIntyre v. Clarkson*, 254 N.C. 510, 119 S.E.2d 888 (1961).

A law is general if it applies to and operates uniformly on all the members of any class of persons, places, or things requiring legislation peculiar to itself in matters covered by the law. *High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 142 S.E.2d 697 (1965); *Gardner v. City of Reidsville*, 269 N.C. 581, 153 S.E.2d 139 (1967).

The provision of the statute (Laws 1927, c. 48) for the acquisition of lands for a national park affects the interest of the people of the State, and though local as to location, is for a public use in contemplation of its acquisition by the State for the purpose outlined in the act. *Yarborough v. North Carolina Park Comm'n*, 196 N.C. 284, 145 S.E. 563 (1928).

What Are Local Laws.—The interpretation of a statute, as to whether it is a local one prohibited by this section of the Constitution, should be largely left to the facts and circumstances of each particular case, giving significance to the rule that legislative acts are presumed to have been rightfully passed from proper motives, and

that a classification of this kind, when made by them, should not be disturbed unless it is manifestly arbitrary and invalid. In *re Harris*, 183 N.C. 633, 112 S.E. 425 (1922).

A "local act" is one operating only in a limited territory or specified locality. *Idol v. Street*, 233 N.C. 730, 65 S.E.2d 313 (1951); *Carolina-Virginia Coastal Highway v. Coastal Tpk. Authority*, 237 N.C. 52, 74 S.E.2d 310 (1953); *Board of Managers of James Walker Mem. Hosp. v. City of Wilmington*, 237 N.C. 179, 74 S.E.2d 749 (1953).

When the persons or things subject to the law are not reasonably different from those excluded the statute is local or special. *McIntyre v. Clarkson*, 254 N.C. 510, 119 S.E.2d 888 (1961).

The phrase local law means, primarily at least, a law that in fact, if not in form, is confined within territorial limits other than that of the whole State, or applies to any political subdivision or subdivisions of the State less than the whole, or to the property and persons of a limited portion of the State, or to a comparatively small portion of the State or is directed to a specific locality or spot as distinguished from a law which operates generally throughout the State. *McIntyre v. Clarkson*, 254 N.C. 510, 119 S.E.2d 888 (1961).

A law is local where, by force of an inherent limitation, it arbitrarily separates some places from others upon which, but for such limitation, it would operate, and where it embraces less than the entire class of places to which such legislation would be necessary or appropriate, having regard to the purpose for which the legislation was designed, and where classification does not rest on circumstances distinguishing the places included from those excluded. *High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 142 S.E.2d 697 (1965); *Gardner v. City of Reidsville*, 269 N.C. 581, 153 S.E.2d 139 (1967).

The number of counties included or excluded is not necessarily determinative. Conceivably, a statute may be local if it excludes only one county. On the other hand, it may be general if it includes only one or a few counties. It is a matter of classification. *High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 142 S.E.2d 697 (1965); *Gardner v. City of Reidsville*, 269 N.C. 581, 153 S.E.2d 139 (1967).

A statute applicable to a single city, without reasonable distinction between such city and other cities or towns for the purpose of classification, is a local act. *Gardner v. City of Reidsville*, 269 N.C. 581, 153 S.E.2d 139 (1967).

In no sense is the filing fee required of candidates in primary elections a local law as condemned by this section. *McLean v. Durham County Bd. of Elections*, 222 N.C. 6, 21 S.E.2d 842 (1942).

Courts Look beyond Form of Statutes.—In determining whether a statute relating to matters enumerated in this section is a "local, private, or special" act inhibited by this section or a "general law" which the General Assembly has the power to pass, the courts will look beyond the form of the act and ascertain whether the statute, in fact, is generally and usually applicable throughout the area comprising the State. *State v. Dixon*, 215 N.C. 161, 1 S.E.2d 521 (1939).

Classifications must be general within the limits of the subject matter. They must be reasonable and the statute must affect all within the class uniformly. Classifications must not be arbitrary or capricious, but must be natural and intrinsic and based on substantial differences. *McIntyre v. Clarkson*, 254 N.C. 510, 119 S.E.2d 888 (1961).

Classification must be reasonable and germane to the law. *High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 142 S.E.2d 697 (1965); *Gardner v. City of Reidsville*, 269 N.C. 581, 153 S.E.2d 139 (1967).

Classification must not be discriminatory, arbitrary or capricious. *High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 142 S.E.2d 697 (1965); *Gardner v. City of Reidsville*, 269 N.C. 581, 153 S.E.2d 139 (1967).

Universality is immaterial so long as those affected are reasonably different from those excluded and, for the purpose of the statute, there is a logical basis for treating them in a different manner. *High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 142 S.E.2d 697 (1965).

Classification must be based on a reasonable and tangible distinction and operate the same on all parts of the State under the same conditions and circumstances. *High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 142 S.E.2d 697 (1965); *Gardner v. City of Reidsville*, 269 N.C. 581, 153 S.E.2d 139 (1967).

Classification does not render a statute "local" if the classification is reasonable and based on rational difference of situation or condition. *High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 142 S.E.2d 697 (1965); *Gardner v. City of Reidsville*, 269 N.C. 581, 153 S.E.2d 139 (1967).

An act is not invalid merely because it is local unless it violates some constitutional provision. *State v. Smith*, 265 N.C. 173, 143 S.E.2d 293 (1965).

This section does not forbid local acts passed in the exercise of delegated police power if they do not relate to the matters therein prohibited. *State v. Smith*, 265 N.C. 173, 143 S.E.2d 293 (1965).

Constitutionality of Statutes Supplementing General Laws.—Statutes which do not directly contravene this section, but supplement general laws and policy, or aid in administering or financing policy established by general law, are not unconstitutional, especially when the administrative unit is local in nature. *McIntyre v. Clarkson*, 254 N.C. 510, 119 S.E.2d 888 (1961).

Local Law Creating and Naming County Health Board.—Chapter 322, Public-Local Laws of 1931, which undertakes to create and name the members of a county board of health for Madison County alone, which board is charged with the duty to inspect county institutions and see that they are kept in a sanitary condition, and to select a physician to vaccinate against disease, is a local act relating to health and sanitation prohibited by this section. *Sams v. Board of County Comm'rs*, 217 N.C. 284, 7 S.E.2d 540 (1940).

Authorizing Consolidation of City and County Health Departments.—Chapter 86, Session Laws 1945, which attempts to authorize Forsyth County and Winston-Salem to consolidate their health departments and name a joint city-county board of health and appoint joint city-county health officers, and which expressly repeals to the extent of any conflict all laws in conflict therewith, is a local act relating to health, and is void for repugnancy to this section. *Idol v. Street*, 233 N.C. 730, 65 S.E.2d 313 (1951); *Board of Managers of James Walker Mem. Hosp. v. City of Wilmington*, 237 N.C. 179, 74 S.E.2d 749 (1953).

Authorizing City and County to Provide for Care of Indigent Sick and Afflicted Poor.—Where an act authorizes the city and county to make provisions for "the hospitalization, medical attention, and care of the indigent sick and afflicted poor" of the city and county alone, to come within the provisions of the act the poor must be sick and afflicted, and the act is thus a local act relating to health, and void as in direct conflict with this section. *Board of Managers of James Walker Mem. Hosp. v. City of Wilmington*, 237 N.C. 179, 74 S.E.2d 749 (1953).

Authorizing Erection of Hospital.—An act authorizing a certain county to erect a tuberculosis hospital and issue bonds therefor, and provide a tax for its maintenance, upon the approval of the voters, is both a special and local act and void under this

section. *Armstrong v. Board of Comm'rs*, 185 N.C. 405, 117 S.E. 388 (1923).

Relating to Municipal Sewerage System. — Chapter 1189, Session Laws of 1963, applicable solely to the town of Beaufort and providing that in the event the sewerage system of a municipality shall have been declared a source of unlawful pollution to adjacent streams or waterways the municipality should not be required to extend any sewerage outfalls into an area annexed by it, is a local act relating to health and sanitation within the meaning of this section and is unconstitutional and void. *Gaskill v. Costlow*, 270 N.C. 686, 155 S.E.2d 148 (1967); *Safrit v. Costlow*, 270 N.C. 680, 155 S.E.2d 252 (1967).

Providing for Sewer and Water Service for School Children. — Chapter 1075, Session Laws 1951, is a local or special act. It relates only to Randolph County, and in Randolph County affects only a single agency, the county board of education. It relates to health and sanitation, since its sole purpose is to prescribe provisions with respect to sewer and water service for local school children in Randolph County. It purports to limit the power of the county board of education to provide for sanitation and healthful conditions in the schools by means of a sewerage system and an adequate water supply. These things being true, this statute is invalid under the mandatory terms of this section. *Lamb v. Board of Educ.*, 235 N.C. 377, 70 S.E.2d 201 (1952).

Authorizing Formation of Sewerage Districts. — A statute authorizing the formation of sanitary sewerage districts within countywide limits, the boundaries of these to be fixed by certain designated local authorities in a specified manner, and done without previous notice to the voters, the statute is not a "local, private or special act relating to health, sanitation, etc." *Reed v. Howerton Eng'r Co.*, 188 N.C. 39, 123 S.E. 479 (1924).

Creating Sanitary District. — An act of the legislature (Private Laws 1927, c. 229) attempting to create a sanitary district within certain lines within a county for the construction and maintenance of sewer and water systems with certain assessments or taxing powers for the purpose is void, being in violation of the provisions of this section. *Drysdale v. Prudden*, 195 N.C. 722, 143 S.E. 530 (1928).

Creating Drainage District. — A statute creating and designating the boundaries of a drainage district and providing taxation for its construction and maintenance is for a necessary purpose and does not fall within the purview of Art. V, § 2, requiring its

submission to the voters within the district, nor is it a local, private or special act relating to health or sanitation inhibited by this section. *Town of Kenilworth v. Hyder*, 197 N.C. 85, 147 S.E. 736 (1929).

Directing Sheriff to Dispose of Cattle in a Particular Area. — Chapter 782, Session Laws 1959, which relates solely to the segment of the outer banks in Carteret County between Beaufort Inlet and Ocracoke Inlet, and purports to authorize and direct the sheriff of Carteret County, without judicial inquiry of any kind, to remove and dispose of all cattle, etc., in this particular area is a local act relating to the abatement of a public nuisance, is unconstitutional, and therefore void as violative of this section. *Chadwick v. Salter*, 254 N.C. 389, 119 S.E.2d 158 (1961).

Changing Names of Cities, Towns or Townships. — While this section forbids the General Assembly to pass any local, private or special act or resolution relating to changing the names of cities, towns or townships, it provides that the General Assembly shall have power to pass general laws regulating such matters. *Hunsucker v. Winborne*, 223 N.C. 650, 27 S.E.2d 817 (1943).

Section Applies Only to Acts Relating to Particular and Designated Highways, Streets or Alleys. — This section applies only to a local act which authorizes the laying out, opening, altering, or discontinuing of a given particular and designated highway, street, or alley. *State v. McBane*, 276 N.C. 60, 170 S.E.2d 913 (1969).

It Does Not Prohibit Local Law Applicable to Maintenance of County Highways. — A public-local law applicable to the maintenance of the public highways of a county and authorizing taxation or issuance of bonds for this purpose, with certain specific supervision and control, is not such local or special act as falls within the inhibition of this section, where it does not affect the "laying out, opening, altering, maintaining or discontinuing" the then existing highways, etc. *State v. Kelly*, 186 N.C. 365, 119 S.E. 755 (1923).

Of Streets within City Limits. — The unlimited power in the General Assembly to provide for the creation and extension of corporate limits of municipal corporations, would seem to include the right to vest in such municipal corporations the authority to levy taxes to lay out and maintain highways and streets within such limits, since they are essential to the existence of such corporations, and such private act would not seem to contravene this section. *Matthews v. Town of Blowing Rock*, 207 N.C. 450, 177 S.E. 429 (1934).

Or Relating to Improvement of Streets and Alleys.—Local acts relating to the improvement of streets and alleys generally in a city or town, and authorizing the assessment of the cost thereof against the abutting property, do not conflict with this section, although unquestionably an act purporting to authorize the laying out of particular streets or highways, or to authorize the maintenance of a designated street or streets, or the discontinuance thereof, would be repugnant to this section. In re Resolutions Passed by City Council, 243 N.C. 494, 91 S.E.2d 171 (1956).

Or Authorizing Issuance of County Road Bonds.—An act of the legislature authorizing the road commissioners of a county to issue bonds, upon the approval of its electors, to obtain moneys for the expenditure upon certain particularly designated objects in respect to its public roads, and which does not contain any provision for the laying out, altering or discontinuing any road or highway, does not contravene this section. *Road Comm'rs v. Bank of Ashe*, 181 N.C. 347, 107 S.E. 245 (1921).

An act of the legislature authorizing the issuance of county bonds for public roads is not in contravention of this section of the Constitution. *Commissioners of Surry County v. Wachovia Bank & Trust Co.*, 178 N.C. 170, 100 S.E. 421 (1919); *Board of Managers of James Walker Mem. Hosp. v. City of Wilmington*, 237 N.C. 179, 74 S.E.2d 749 (1953).

An act of the legislature authorizing the road commissioners of a county to issue bonds, upon the approval of its electors, to obtain moneys for the expenditure upon certain particularly designated objects in respect to its public roads, and which does not contain any provision for the laying out, altering or discontinuing any road or highway, does not contravene this section. *Road Comm'rs v. Bank of Ashe*, 181 N.C. 347, 107 S.E. 245 (1921).

Or Prescribing Legislative Rule as to Distribution of Bond Proceeds.—An act of the legislature may prescribe a rule by which the proceeds of the sales of bonds it authorizes a county to issue for road purposes, shall be disbursed and distributed in order to effect the best results, when it is confined to the control and management of the funds, and leaves to the local authorities the power given them by this section over "the laying out, opening, or discontinuance of highways." *Board of Comm'rs v. Pruden & Co.*, 178 N.C. 394, 100 S.E. 695 (1919).

Or to Statute Providing for Required and Permitted Provisions of County Sub-

division Ordinances.—The statutory provisions of G.S. §§ 153-266.3 and 153-266.4, as to what may and what must be included in a county subdivision ordinance, do not constitute "authorizing the laying out, opening, altering, maintaining, or discontinuing of highways, streets, or alleys," within the meaning of this section. *State v. McBane*, 276 N.C. 60, 170 S.E.2d 913 (1969).

Or for Control of County Roads.—A statute that abolishes two boards of road commissioners in a county and gives to another board, created by the same act, entire control and management of the public roads and bridges of the county, does not violate this section of the State Constitution. *Huneycutt v. Board of Rd. Comm'rs*, 182 N.C. 319, 109 S.E. 4 (1921).

A public-local law authorizing the commissioners of a county to take over a specified highway within the county, constituting one of the principal highways within the county, connecting two important State highways, transferring to the said commissioners the bridges of the various townships for their care and supervision, is not violative of this section. *Hill v. Board of Comm'rs*, 190 N.C. 123, 129 S.E. 154 (1925). See *Thomson v. Harnett County*, 209 N.C. 662, 184 S.E. 490 (1936).

Chapter 216, Private Laws 1925, is not a special statute relating to roads inhibited by this section, the act not relating to the laying out, opening, altering, or discontinuance of any particular and designated highway, street, or alley. *Deese v. Town of Lumberton*, 211 N.C. 31, 188 S.E. 857 (1936).

Subsequent Local Law Increasing Authority Granted to City before Effective Date of Section.—Where a local statute giving a municipality power to improve its streets and assess abutting owners for a part of the cost, is enacted prior to the effective date of this section, a subsequent local law which merely increases the jurisdiction and authority granted to the city in regard to such improvements does not violate the constitutional proscription. *City of Goldsboro v. Atlantic Coast Line R.R.*, 241 N.C. 216, 85 S.E.2d 125 (1954).

Private Act Closing Certain Public Roads Held to Violate Section.—Part of land in a private development was added to the playground of a public school. The General Assembly, by private act (c. 72, Private Laws of 1933), declared that certain roads dedicated in the registered plot of the development were no longer needed, and declared that the roads should be closed and added to the playground space for the school. This act is void as being a

private or special act inhibited by this section. *Glenn v. Board of Educ.*, 210 N.C. 525, 185 S.E. 781 (1936).

Act Authorizing Construction of Toll Roads and Bridges in Five Counties Only.

—An act which authorizes the construction and operation of toll roads and toll bridges only within five counties of the State is repugnant to this section and is therefore void. *Carolina-Virginia Coastal Highway v. Coastal Tpk. Authority*, 237 N.C. 52, 74 S.E.2d 310 (1953).

Building Bridges. — A legislative enactment relating to the building of bridges by a county over a nonnavigable stream or river does not necessarily come within the purview and control of this section. *Mills v. Board of Comm'rs*, 175 N.C. 215, 95 S.E. 481 (1918).

While authority given by statute to a county or other political agency of a state, to issue bonds for highways in aid to their maintenance or construction is not direct, local or special legislation as is prohibited by this section, it is otherwise where the statute directs the building of a bridge at a specified place across a stream between two counties, and as an incident permits the issuance of bonds or the levying of taxes for the purpose, pledging the faith and credit of the State. *Day v. Commissioners of Yadkin County*, 191 N.C. 780, 133 S.E. 164 (1926).

Local Laws Establishing or Changing Lines of School Districts Prohibited. — Since the enforcement of this section, special act of the legislature to establish or change the lines, etc., of a school district, and any proceedings under it, are null and void. *Galloway v. Board of Educ.*, 184 N.C. 245, 114 S.E. 165 (1922).

A statute which lays off or defines by boundary a certain territory as a graded school district within a county, and provides for an issue of bonds upon the approval of the voters therein, for the necessary buildings and maintenance, comes within the provision of this section. *Board of Trustees v. Mutual Loan & Trust Co.*, 181 N.C. 306, 107 S.E. 130 (1921).

A statute which creates a public school district and allows a bond issue, upon the approval of voters, for its equipment and maintenance, is a local or special act, prohibited by this section. *Robinson v. Board of Comm'rs*, 182 N.C. 590, 109 S.E. 855 (1921).

Meaning of "School District". — A "school district" is an area within a county in which one or more public schools must be maintained. It is so defined in G.S. § 115-7. *Hobbs v. County of Moore*, 267 N.C. 665, 149 S.E.2d 1 (1966).

An "administrative unit" is not a "school district" within the meaning of this section. *Hobbs v. County of Moore*, 267 N.C. 665, 149 S.E.2d 1 (1966).

Provision for Bonds and Taxation to Carry Out Purpose of Void Act Is Likewise Void.—Where an act to create a public school district is unconstitutional, because it violates this section, the provision for bonds and taxation to carry out the purpose of the act is likewise void. *Sechrist v. Board of Comm'rs*, 181 N.C. 511, 107 S.E. 503 (1921).

An act for the purpose of ratifying a county ordinance providing for the issuance of bonds and levy of taxes for school purposes in a district established without authority is a local, private or special act prohibited by this section, and the issuance of such bonds and levy of such taxes will be permanently enjoined. *Woosley v. Commissioners of Davidson County*, 182 N.C. 429, 109 S.E. 368 (1921).

Incorporation of Existing School Districts.—Incorporating existing local school districts for all purposes relating to the issuance or payment of bonds upon the approval of the voters of a district, is valid, and not in contravention of this section. *Board of Trustees v. Mutual Loan & Trust Co.*, 181 N.C. 306, 107 S.E. 130 (1921); *Paschal v. Johnson*, 183 N.C. 129, 110 S.E. 841 (1922).

Allowing Existing School District to Submit Question of Bonds and Taxation to Voters. — A statute allowing an existing consolidated school district to submit the question of taxation and the issue of bonds for school purposes to the district is not prohibited by this section. *Burney v. Commissioners of Bladen County*, 184 N.C. 274, 114 S.E. 298 (1922).

Increase of Bonds by Existing School District.—See *Roebuck v. Board of Trustees*, 184 N.C. 144, 113 S.E. 676 (1922).

Setting Up Machinery under Which County May Establish School Districts.—This section prohibits the legislature from passing any special, private or local act which ex proprio vigore undertakes to establish or change the boundaries of a school district, but this section does not proscribe the legislature from setting up machinery under which a county, as the administrative unit charged with making provisions for necessary capital outlay, may create school districts or special bond tax units within the county to accomplish this purpose, and therefore c. 279, Public-Local Laws of 1937, which provides the machinery under which the county of Buncombe may establish school districts or special bond tax units in the county, is

not in contravention of this section. *Fletcher v. Collins*, 218 N.C. 1, 9 S.E.2d 606 (1940); *Hinson v. Board of Comm'rs*, 218 N.C. 13, 9 S.E.2d 614 (1940).

Enabling Consolidation of County and City School Administrative Units under General Laws.—A statute enabling the consolidation of county and city school administrative units under the general laws and the levy of certain taxes for the construction and operation of the schools of the consolidated unit, does not violate this section, since it does not, in itself, undertake to establish or change the lines of a school district, but merely provides machinery for action by local units under the general law, and further provisions of the statute requiring that the merger and the levy of the taxes be approved by a vote does not alter this result. *Peacock v. County of Scotland*, 262 N.C. 199, 136 S.E.2d 612 (1964).

Extending Limits of City or Town in Which Schools May Be Maintained.—It is true that the boundaries of a "district" may be coterminous with those of a city or town but it does not follow that an act extending the limits of a city or town in which public schools may be maintained is necessarily a special act establishing or changing the lines of school districts in violation of the constitutional provision. *Hailey v. City of Winston-Salem*, 196 N.C. 17, 144 S.E. 377 (1928).

Recognizing School District in Changed City Limits.—A public-local act that enlarged the city limits and recognized therein the independent existence of a public school district within the former limits is not contrary to the provisions of this section, as an attempt to establish a school district, or to change the limits of those already established. *Duffy v. City of Greensboro*, 186 N.C. 470, 120 S.E. 53 (1923).

Session Laws 1965, Chapter 1051, Not Violative of This Section.—See *Hobbs v. County of Moore*, 267 N.C. 665, 149 S.E.2d 1 (1966).

It was not contemplated under this section that the State would enter any trade or business venture for profit. *Gardner v. City of Reidsville*, 269 N.C. 581, 153 S.E.2d 139 (1967).

Meaning of "Trade."—"Trade" as used in this section refers to a business venture embarked in for gain or profit by a person or a business corporation. *Gardner v. City of Reidsville*, 269 N.C. 581, 153 S.E.2d 139 (1967).

A trade within the meaning of this section includes any employment or business embarked in for gain or profit. *Orange*

Speedway v. Clayton, 247 N.C. 528, 101 S.E.2d 406 (1958); *State v. Smith*, 265 N.C. 173, 143 S.E.2d 293 (1965).

Trade within the meaning of this section is a business venture for profit and includes any employment or business embarked in for gain or profit. *High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 142 S.E.2d 697 (1965).

"Trade" as used in this section refers to commerce engaged in by citizens of the State, and not a restricted activity conducted by the State itself. *Gardner v. City of Reidsville*, 269 N.C. 581, 153 S.E.2d 139 (1967).

Trade, in its broadest sense, includes any employment or business engaged in for gain or profit. *State v. Dixon*, 215 N.C. 161, 1 S.E.2d 521 (1939).

Dispensing of intoxicating liquors by State is not a "trade" within the meaning of this section. *Gardner v. City of Reidsville*, 269 N.C. 581, 153 S.E.2d 139 (1967).

The word "trade" was not intended by the drafters of this section to include the monstrous and demanding problem of intoxicating liquors. *Gardner v. City of Reidsville*, 269 N.C. 581, 153 S.E.2d 139 (1967).

Chapter 650, Session Laws 1965, authorizing a local option election in Reidsville to determine whether alcoholic beverage control stores may be operated in that city and providing for the establishment of a city board of alcoholic control if authority is granted, does not violate this section as the act of dispensing intoxicating liquor by the State is not a trade, but is a valid exercise of its police powers. *Gardner v. City of Reidsville*, 269 N.C. 581, 153 S.E.2d 139 (1967).

Section Does Not Limit Power of State to Control Intoxicating Liquor.—This section is not intended to limit or fetter the police power of the State in any manner in its control of intoxicating liquor. *Gardner v. City of Reidsville*, 269 N.C. 581, 153 S.E.2d 139 (1967).

Had it been the intention of the General Assembly to include the ever-present and important question of intoxicating liquor among the prohibited subjects in this section, the term "intoxicating liquor" would have been included in the enumerated list. *Gardner v. City of Reidsville*, 269 N.C. 581, 153 S.E.2d 139 (1967).

Fair Trade Act.—The North Carolina Fair Trade Act, in limiting its application to commodities bearing a trademark and in exempting from its operation such commodities when sold to particular classes of persons, sets up reasonable classifications and applies uniformly to all persons or

things coming therein, and therefore is a general act regulating trade and does not contravene this section. *Ely Lilly & Co. v. Saunders*, 216 N.C. 163, 4 S.E.2d 528, 125 A.L.R. 1308 (1939).

Sunday Sale Laws.—A statute proscribing the sale on Sunday of merchandise falling within certain classifications is a statute regulating trade under the purview of this section. *Treasure City of Fayetteville, Inc. v. Clark*, 261 N.C. 130, 134 S.E.2d 97 (1964).

An act which restricts or regulates the operation, engaging in or carrying on of business, or prohibits the sale of merchandise on Sunday, regulates trade. *High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 142 S.E.2d 697 (1965).

Section 14-346.2 of the General Statutes, proscribing the sale on Sunday of merchandise of specific classifications within the State, but exempting designated counties and parts of counties therefrom, with provision that the areas exempted are exempted upon the classification of such areas as resort or tourist areas, but which does not define "resort area" and which as a matter of common knowledge does not exempt all recognized tourist areas of the State or, by its classifications of goods, preclude the sale only of such merchandise as is inappropriate to the tourist trade, is held void as a local law in violation of this section. *Treasure City of Fayetteville, Inc. v. Clark*, 261 N.C. 130, 134 S.E.2d 97 (1964).

A statute which purported to authorize only 52 of the 100 counties to regulate and prohibit the sale of goods, wares, and merchandise on Sunday, was a local act regulating trade and thus a violation of this section. *State v. Smith*, 265 N.C. 173, 143 S.E.2d 293 (1965).

Such statute was a local statute and hence void by the express provisions of this section. *High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 142 S.E.2d 697 (1965).

Sunday-Observance Ordinances.—When a county or a city attempts to pass, under a local grant of police power, a Sunday-observance ordinance whose only effect is to regulate trade, the legislation must yield to this section, whether the purported authority to pass it be specifically conferred in the act or not. *State v. Smith*, 265 N.C. 173, 143 S.E.2d 293 (1965).

If an ordinance prohibits all of a certain type of activity on Sunday, as, e.g., motor vehicle racing, which might or might not be commercial, its exercise of police power does not conflict with this section, for its regulation of trade is merely incidental, or

consequential. *State v. Smith*, 265 N.C. 173, 143 S.E.2d 293 (1965).

When enacted by cities and towns under general laws, Sunday-observance ordinances which are reasonable and do not discriminate within a class of competitors similarly situated have been upheld as a valid exercise of delegated police power. All such ordinances, when they proscribe buying and selling, whether it be, say, tangible merchandise or a ticket to an amusement or a sporting event, regulate trade under the broad definition of trade which has been adopted by the Supreme Court. Since, however, these city ordinances are passed under general laws, G.S. § 160-52 and § 160-200 (6), (7), and (10), with reference to them there is no conflict between the exercise of the police power and this section. *State v. Smith*, 265 N.C. 173, 143 S.E.2d 293 (1965).

Ban on Motor Vehicle Races on Sunday.—Chapter 177, Session Laws of 1949, bans all motor vehicle races on Sunday in Wake County without regard to the commercial or noncommercial character of the activity, and therefore, it is not an act regulating labor or trade within the meaning of this section. Persons whose activities are commercial in character are in no better position than those who engage in the proscribed activity without reference to profit. *State v. Chestnutt*, 241 N.C. 401, 85 S.E.2d 297 (1955).

Regulating Professional Automobile and Motorcycle Racing.—A statute applicable to one county alone which attempts to regulate professional automobile and motorcycle racing, rather than automobile and motorcycle racing in general, is void as a local act regulating labor or trade. *Orange Speedway v. Clayton*, 247 N.C. 528, 101 S.E.2d 406 (1958), holding Session Laws 1957, c. 588, void.

A statute which provides for the operation of a dog racing track by the licensee of the Morehead City Racing Commission is held a local and special act relating to trade, and is unconstitutional. *State ex rel. Taylor v. Carolina Racing Ass'n*, 241 N.C. 80, 84 S.E.2d 390 (1954).

Statute Authorizing County to Regulate Poolrooms, etc.—Section 1 (3), c. 1071, Session Laws 1953, as amended by § 1½ (3), c. 943, Session Laws 1961, authorizing the Forsyth County board of commissioners to regulate public poolrooms, billiard parlors, dance halls, and clubs is a local act regulating trade and, therefore, unconstitutional under this section. *State v. Smith*, 265 N.C. 173, 143 S.E.2d 293 (1965).

A statute providing for the licensing and regulations of real estate brokers and

salesmen and imposing a license tax on those engaged in the trade in addition to the tax imposed by the Revenue Act for a statewide license, was held applicable to only a limited territory and specified localities, and the act was therefore a local act regulating trade in contravention of this section. *State v. Dixon*, 215 N.C. 161, 1 S.E.2d 521 (1939).

Statute including deputy sheriffs within term "employee" as used in Workmen's Compensation Act is consonant with the provisions of this section. *Towe v. Yancey County*, 224 N.C. 579, 31 S.E.2d 754 (1944).

Collection of Tax Liens.—An act relating to establishment and collection of tax liens, which applies to only one county of the State, is void as a violation of this section. *Town of Wake Forest v. Holding*, 207 N.C. 808, 178 S.E. 594 (1935).

Giving Board of Equalization Opportu-

nity to Act on Appeals. — Chapter 916, Session Laws 1961, applicable only to Mecklenburg County, does not have the effect of extending the time for the assessment of taxes in Mecklenburg County, but merely gives the board of equalization and review of that county opportunity to act on appeals by property owners from the assessing authorities, and the statute does not vest the board with authority *ex mero motu* to increase valuations after the time limited by subsection (e) of G.S. § 105-327, and to construe it as having such effect would render it unconstitutional as a special act. *Spiers v. Davenport*, 263 N.C. 56, 138 S.E.2d 762 (1964).

The only limitation on powers in enacting statutes relating to divorce is found in this section. *Cooke v. Cooke*, 164 N.C. 272, 80 S.E. 178 (1913); *Long v. Long*, 206 N.C. 706, 175 S.E. 85 (1934).

ARTICLE III

EXECUTIVE

Section 1. *Executive power.* The executive power of the State shall be vested in the Governor.

Cross Reference. — See Art. I, § 6, and note thereto.

Editor's Note.—The provisions of this

section are similar to those of the first clause of Art. III, § 1, Const. 1868, as amended in 1872-3 and 1944.

Sec. 2. *Governor and Lieutenant Governor: election, term, and qualifications.*

(1) *Election and term.* The Governor and Lieutenant Governor shall be elected by the qualified voters of the State in 1972 and every four years thereafter, at the same time and places as members of the General Assembly are elected. Their term of office shall be four years and shall commence on the first day of January next after their election and continue until their successors are elected and qualified.

(2) *Qualifications.* No person shall be eligible for election to the office of Governor or Lieutenant Governor unless, at the time of his election, he shall have attained the age of 30 years and shall have been a citizen of the United States for five years and a resident of this State for two years immediately preceding his election. No person elected to either of these two offices shall be eligible for election to the next succeeding term of the same office.

Editor's Note.—The provisions of subsection (1) of this section are similar to those of Art. III, § 1, Const. 1868, as amended in 1872-3 and 1944. The provi-

sions of subsection (2) of this section are similar to those of Art. III, § 2, Const. 1868, as amended in 1962.

Sec. 3. *Succession to office of Governor.*

(1) *Succession as Governor.* The Lieutenant Governor-elect shall become Governor upon the failure of the Governor-elect to qualify. The Lieutenant Governor shall become Governor upon the death, resignation, or removal from office of the Governor. The further order of succession to the office of Governor shall be prescribed by law. A successor shall serve for the remainder of the term of the Governor whom he succeeds and until a new Governor is elected and qualified.

(2) *Succession as Acting Governor.* During the absence of the Governor from the State, or during the physical or mental incapacity of the Governor to perform the duties of his office, the Lieutenant Governor shall be Acting Governor. The further order of succession as Acting Governor shall be prescribed by law.

(3) *Physical incapacity.* The Governor may, by a written statement filed with the Attorney General, declare that he is physically incapable of performing the duties of his office, and may thereafter in the same manner declare that he is physically capable of performing the duties of his office.

(4) *Mental incapacity.* The mental incapacity of the Governor to perform the duties of his office shall be determined only by joint resolution adopted by a vote of two-thirds of all the members of each house of the General Assembly. Thereafter, the mental capacity of the Governor to perform the duties of his office shall be determined only by joint resolution adopted by a vote of a majority of all the members of each house of the General Assembly. In all cases, the General Assembly shall give the Governor such notice as it may deem proper and shall allow him an opportunity to be heard before a joint session of the General Assembly before it takes final action. When the General Assembly is not in session, the Council of State, a majority of its members concurring, may convene it in extra session for the purpose of proceeding under this paragraph.

(5) *Impeachment.* Removal of the Governor from office for any other cause shall be by impeachment.

Editor's Note.—The provisions of this section are similar to those of Art. III, § 12, Const. 1868, as amended in 1962, and the case cited in the following annotation was decided under that section.

The Constitution provides for the succession of the Governor and the Lieutenant Governor and does not authorize a vacancy in either office to be filled at an election for any portion of an unexpired

term. *Thomas v. State Bd. of Elections*, 256 N.C. 401, 124 S.E.2d 164 (1962).

Governor May Not Appoint Successor to Lieutenant Governor.—There is no constitutional provision which authorizes the Governor to appoint a successor to a deceased Lieutenant Governor to fill out a vacancy existing by reason of his death. *Thomas v. State Bd. of Elections*, 256 N.C. 401, 124 S.E.2d 164 (1962).

Sec. 4. *Oath of office for Governor.* The Governor, before entering upon the duties of his office, shall, before any Justice of the Supreme Court, take an oath or affirmation that he will support the Constitution and laws of the United States and of the State of North Carolina, and that he will faithfully perform the duties pertaining to the office of Governor.

Editor's Note.—The provisions of this section are similar to those of Art. III, § 4, Const. 1868.

Sec. 5. *Duties of Governor.*

(1) *Residence.* The Governor shall reside at the seat of government of this State.

(2) *Information to General Assembly.* The Governor shall from time to time give the General Assembly information of the affairs of the State and recommend to their consideration such measures as he shall deem expedient.

(3) *Budget.* The Governor shall prepare and recommend to the General Assembly a comprehensive budget of the anticipated revenue and proposed expenditures of the State for the ensuing fiscal period. The budget as enacted by the General Assembly shall be administered by the Governor.

(4) *Execution of laws.* The Governor shall take care that the laws be faithfully executed.

(5) *Commander in Chief.* The Governor shall be Commander in Chief of the military forces of the State except when they shall be called into the service of the United States.

(6) *Clemency.* The Governor may grant reprieves, commutations, and pardons, after conviction, for all offenses (except in cases of impeachment), upon such conditions as he may think proper, subject to regulations prescribed by law relative to the manner of applying for pardons. The terms reprieves, commutations, and pardons shall not include paroles.

(7) *Extra sessions.* The Governor may, on extraordinary occasions, by and with

the advice of the Council of State, convene the General Assembly in extra session by his proclamation, stating therein the purpose or purposes for which they are thus convened.

(8) *Appointments.* The Governor shall nominate and by and with the advice and consent of a majority of the Senators appoint all officers whose appointments are not otherwise provided for.

(9) *Information.* The Governor may at any time require information in writing from the head of any administrative department or agency upon any subject relating to the duties of his office.

(10) *Administrative reorganization.* The General Assembly shall prescribe the functions, powers, and duties of the administrative departments and agencies of the State and may alter them from time to time, but the Governor may make such changes in the allocation of offices and agencies and in the allocation of those functions, powers, and duties as he considers necessary for efficient administration. If those changes affect existing law, they shall be set forth in executive orders, which shall be submitted to the General Assembly not later than the sixtieth calendar day of its session, and shall become effective and shall have the force of law upon adjournment sine die of the session, unless specifically disapproved by resolution of either house of the General Assembly or specifically modified by joint resolution of both houses of the General Assembly. (1969, c. 932, s. 1.)

Editor's Note.—The provisions of subsections (1) and (2) of this section are similar to those of Art. III, § 5, Const. 1868. The provisions of subsections (4) and (9) are similar to those of Art. III, § 7, Const. 1868. The provisions of subsection (5) are similar to those of Art. III, § 8, Const. 1868. The provisions of subsection (6) are similar to those of Art. III, § 6, Const. 1868, as amended in 1872-3 and 1954. The provisions of subsection (7) are similar to those of Art. III, § 9, Const. 1868. The provisions of subsection (8) are similar to those of Art. III, § 10, Const. 1868, as amended by the Convention of 1875.

Subsection (10) of this section was added by amendment adopted by vote of the people at the general election held Nov. 3, 1970. The amendment is effective July 1, 1971.

The cases in the following annotation were decided under the corresponding provisions of the Constitution of 1868.

For article on punishment for crime in North Carolina, see 17 N.C.L. Rev. 205.

Duty of Governor Generally.—The Governor as the constituted head of the executive department is charged with the duty of seeing that legislative acts are carried into effect. *Winslow v. Morton*, 118 N.C. 486, 24 S.E. 417 (1896).

Pardons Exclusive Prerogative of Governor.—After a defendant has begun the service of his term, or at least when that takes place after the adjournment of the court, it is beyond the jurisdiction of the judge to alter it or interfere with it in any way, as the power of pardon, parole or discharge during the term of imprisonment is

by this section the exclusive prerogative of the Governor. *State v. Lewis*, 226 N.C. 249, 37 S.E.2d 691 (1946), decided before the 1954 amendment to Art. III, § 6, Const. 1868, which amendment terminated the Governor's power of parole.

Power of General Assembly to Pass Amnesty Act.—The power, granted by this section, to exercise clemency after conviction in some particular case and in favor of an individual especially charged with the offense, is an executive act of a quasi-judicial kind, and does not conflict with or exclude the power of the General Assembly to pass an amnesty act in abolition or oblivion of the offense. *State v. Bowman*, 145 N.C. 452, 59 S.E. 74, 122 Am. St. R. 464 (1907).

The Governor may grant a pardon upon a condition precedent that the prisoner pay costs of trial; and upon condition subsequent, that he remain of good character, and be sober and industrious. *In re Williams*, 149 N.C. 436, 63 S.E. 108, 22 L.R.A. (n.s.) 238 (1908).

Pardon While Appeal Pending. — The term "conviction," in this section denotes a verdict of guilty rendered by a jury; therefore, when defendant, after verdict and judgment in the court below, appealed to the Supreme Court and, pending such appeal, was pardoned by the Governor, such pardon is authorized by this section and is valid. *State v. Alexander*, 76 N.C. 231 (1877); *State v. Mathis*, 109 N.C. 815, 13 S.E. 917 (1891).

Sentence Active in Part and Suspended in Part.—It is not within the power of a court to impose sentence active in part and

suspended in part. Where a single offense is involved, the sentence must be made active in full or suspended in full. A split sentence is in effect an anticipatory pardon or parole, violative of the provisions of the Constitution of North Carolina appertaining to pardons and paroles. In re Powell, 241 N.C. 288, 84 S.E.2d 906 (1954).

Power of Appointment under Constitution of 1868—In General.—In the Constitution of 1868, Art. III, § 10, corresponding to subsection (8) of this section, authorized the Governor to appoint "all officers whose offices are established by this Constitution, which shall be created by law, and whose appointments are not otherwise provided for," and prohibited the General Assembly from appointing or electing such officers. In 1875, the section was amended and this express prohibition was removed and the express grant of power to the Governor restricted to "all officers whose offices are established by this Constitution and whose offices are not otherwise provided for."

Construing Art. III, § 10, and cognate sections of the Constitution of 1868 in reference to vacancies, etc., prior to 1875, it was held in various decisions that the term, "unless otherwise provided for," meant unless otherwise provided for by the Constitution itself, and that, except in specified and restricted instances, the legislature had no power to appoint to office or to fill vacancies therein. State ex rel. Clark v. Stanley, 66 N.C. 60 (1872); People ex rel. Nichols v. McKee, 68 N.C. 429 (1873); People ex rel. Welker v. Bledsoe, 68 N.C. 457 (1873). And see Trustees of Univ. of N.C. v. McIver, 72 N.C. 76 (1875). Article III, § 10, Const. 1868, as it then existed, and others of kindred nature, were altered by the Convention of 1875. And it became the accepted view that, in all offices created by statute, including the directorates of State institutions, the power of appointment, either original or to fill vacancies, was subject to legislative provision as expressed in a valid enactment. See State ex rel. Salisbury v. Croom, 167 N.C. 223, 83

S.E. 354 (1914); Cunningham v. Sprinkle, 124 N.C. 638, 33 S.E. 138 (1899); State ex rel. Cherry v. Burns, 124 N.C. 761, 33 S.E. 136 (1899).—Ed. note.

Same—Filling Vacancy and Appointing for Regular Term Distinguished. — The Governor never nominates to the Senate to fill vacancies. He does that alone, in all cases. But where officers have to be appointed to fill a regular term, then he nominates to the Senate, unless it be an officer who is elected by the people, and then he never nominates to the Senate, but fills the vacancy or term by his own appointment (unless there is an officer holding over), until the people can elect. People ex rel. Battle v. McIver, 68 N.C. 467 (1873), decided prior to 1875 amendment to Art. III, § 10, Const. 1868.

Same—Appointment by Governor Limited to Constitutional Officers. — The inherent right of the Governor to appoint was restricted to constitutional offices and where the Constitution of 1868 itself so provided. State ex rel. Salisbury v. Croom, 167 N.C. 223, 83 S.E. 354 (1914).

Same—Power of Legislature to Fill Statutory Offices. — The Convention of 1875 intended to alter the Constitution as interpreted in People ex rel. Nichols v. McKee, 68 N.C. 429 (1873), and to confer upon the General Assembly the power to fill offices created by statute. State Prison v. Day, 124 N.C. 362, 32 S.E. 748 (1899), citing Ewart v. Jones, 116 N.C. 570, 21 S.E. 787 (1895). See also State ex rel. Osborne v. Town of Canton, 219 N.C. 139, 13 S.E.2d 265 (1941).

Same—Transfer of Duties of Office.—While the General Assembly has the power to abolish an office created by legislative authority, it cannot by mere transfer to others of the duties, connected with an institution, necessary and useful to the public, to be exercised by them, oust the incumbent from an office belonging to him under a contract with the State. State Prison v. Day, 124 N.C. 362, 32 S.E. 748 (1899).

Sec. 6. Duties of the Lieutenant Governor. The Lieutenant Governor shall be President of the Senate, but shall have no vote unless the Senate is equally divided. He shall perform such additional duties as the General Assembly or the Governor may assign to him. He shall receive the compensation and allowances prescribed by law.

Editor's Note.—The provisions of this section are similar to those of Art. III, § 11, Const. 1868, as amended in 1944.

Sec. 7. Other elective officers.

(1) **Officers.** A Secretary of State, an Auditor, a Treasurer, a Superintendent of Public Instruction, an Attorney General, a Commissioner of Agriculture, a Com-

missioner of Labor, and a Commissioner of Insurance shall be elected by the qualified voters of the State in 1972 and every four years thereafter, at the same time and places as members of the General Assembly are elected. Their term of office shall be four years and shall commence on the first day of January next after their election and continue until their successors are elected and qualified.

(2) *Duties.* Their respective duties shall be prescribed by law.

(3) *Vacancies.* If the office of any of these officers is vacated by death, resignation, or otherwise, it shall be the duty of the Governor to appoint another to serve until his successor is elected and qualified. Every such vacancy shall be filled by election at the first election for members of the General Assembly that occurs more than 30 days after the vacancy has taken place, and the person chosen shall hold the office for the remainder of the unexpired term fixed in this Section. When a vacancy occurs in the office of any of the officers named in this Section and the term expires on the first day of January succeeding the next election for members of the General Assembly, the Governor shall appoint to fill the vacancy for the unexpired term of the office.

(4) *Interim officers.* Upon the occurrence of a vacancy in the office of any one of these officers for any of the causes stated in the preceding paragraph, the Governor may appoint an interim officer to perform the duties of that office until a person is appointed or elected pursuant to this Section to fill the vacancy and is qualified.

(5) *Acting officers.* During the physical or mental incapacity of any one of these officers to perform the duties of his office, as determined pursuant to this Section, the duties of his office shall be performed by an acting officer who shall be appointed by the Governor.

(6) *Determination of incapacity.* The General Assembly shall by law prescribe with respect to those officers, other than the Governor, whose offices are created by this Article, procedures for determining the physical or mental incapacity of any officer to perform the duties of his office, and for determining whether an officer who has been temporarily incapacitated has sufficiently recovered his physical or mental capacity to perform the duties of his office. Removal of those officers from office for any other cause shall be by impeachment.

Editor's Note.—The provisions of this section are similar to those of Art. III, § 1, Const. 1868, as amended in 1872-3 and 1944, and Art. III, § 13, Const. 1868, as amended in 1872-3, 1944, 1954 and 1962. The case cited in the following annotation was decided under Art. III, § 13, Const. 1868.

Vacancies Filled by Appointment until Election.—In each of the offices named in this section in which a vacancy is required to be filled, the duty is imposed upon the Governor to appoint another to fill the office until a successor is elected and qual-

ified. *Thomas v. State Bd. of Elections*, 256 N.C. 401, 124 S.E.2d 164 (1962).

No Election of Successor to Lieutenant Governor.—If it had been the intent of the framers of the Constitution to authorize or require the election of a successor to fill a vacancy in the office of Lieutenant Governor, as required with respect to the offices named in this section, then there is no sound reason why the framers of the Constitution did not include the office of Lieutenant Governor in this section. *Thomas v. State Bd. of Elections*, 256 N.C. 401, 124 S.E.2d 164 (1962).

Sec. 8. *Council of State.* The Council of State shall consist of the officers whose offices are established by this Article.

Editor's Note. — The provisions of this section are similar to those of Art. III, §

14, Const. 1868, as amended in 1872-3 and 1944.

Sec. 9. *Compensation and allowances.* The officers whose offices are established by this Article shall at stated periods receive the compensation and allowances prescribed by law, which shall not be diminished during the time for which they have been chosen.

Editor's Note.—The provisions of this section are similar to those of Art. III, § 15, Const. 1868, as amended in 1962.

Sec. 10. *Seal of State.* There shall be a seal of the State, which shall be kept by the Governor and used by him as occasion may require, and shall be called "The Great Seal of the State of North Carolina". All grants and commissions shall be issued in the name and by the authority of the State of North Carolina, sealed with "The Great Seal of the State of North Carolina", and signed by the Governor.

Editor's Note.—The provisions of this section are similar to those of Art. III, § 16, Const. 1868.

Sec. 11. *Administrative departments.* Not later than July 1, 1975, all administrative departments, agencies, and offices of the State and their respective functions, powers, and duties shall be allocated by law among and within not more than 25 principal administrative departments so as to group them as far as practicable according to major purposes. Regulatory, quasi-judicial, and temporary agencies may, but need not, be allocated within a principal department. (1969, c. 932, s. 1.)

Editor's Note.—This section was added by amendment adopted by vote of the people at the general election held Nov. 3, 1970. The amendment is effective July 1, 1971.

Definition of "Administrative Departments, Agencies and Offices of the State".—See opinion of Attorney General to Senator John T. Henley, State Government Reorganization Study, 1/28/70.

ARTICLE IV JUDICIAL

Section 1. *Judicial power.* The judicial power of the State shall, except as provided in Section 3 of this Article, be vested in a Court for the Trial of Impeachments and in a General Court of Justice. The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government, nor shall it establish or authorize any courts other than as permitted by this Article.

Cross Reference. — For statute implementing this article, see G.S. § 7A-1 et seq.

Editor's Note.—The provisions of this section are similar to those of Art. IV, § 1, Const. 1868, as that article was rewritten in 1962, and the case cited in the following annotation was decided under that section.

For comment on court reform under 1962 amendment to Art. IV of the Constitution of 1868, see 42 N.C.L. Rev. 858 (1964).

For note on judicial review and separation of powers, see 45 N.C.L. Rev. 467 (1967).

Judicial Power Vested in General Court of Justice.—The primary purpose of the 1962 amendment, which rewrote Art. IV of the Constitution of 1868, was to establish "a unified judicial system." To accomplish this result, all judicial power, except that vested in a court for the trial of impeachments and in administrative agencies, is now vested by the Constitution in the General Court of Justice. *State v. Matthews*, 270 N.C. 35, 153 S.E.2d 791 (1967).

Limitation on Power of General Assembly to Establish Courts.—The last clause of this section, providing that the General Assembly shall have no power to "estab-

lish or authorize any courts other than as permitted by this article," was entirely new with the 1962 amendment to Art. IV of the Constitution of 1868. *State v. Matthews*, 270 N.C. 35, 153 S.E.2d 791 (1967).

General Assembly May Not Confer Judicial Power on Police Officer. — A police officer is neither an official of the General Court of Justice, nor an administrative agency within the meaning of § 3 of this article, hence the General Assembly lacks constitutional authority to confer judicial power upon a police officer. *State v. Matthews*, 270 N.C. 35, 153 S.E.2d 791 (1967).

Section 160-20.1 of the General Statutes and Session Laws 1963, c. 1093, purporting to confer judicial powers on police "desk officers" who are not officers of the General Court of Justice and who were not vested with judicial power on November 6, 1962, are unconstitutional and void. *State v. Matthews*, 270 N.C. 35, 153 S.E.2d 791 (1967).

Thus Police Officer May Not Authorize Issuance of Warrant. — The General Assembly cannot confer upon a police officer judicial power sufficient to authorize the issuance of a valid warrant under

any circumstances, even where the complainant is a private citizen and has no connection with any law-enforcement agency.

State v. Matthews, 270 N.C. 35, 153 S.E.2d 791 (1967).

Sec. 2. General Court of Justice. The General Court of Justice shall constitute a unified judicial system for purposes of jurisdiction, operation, and administration, and shall consist of an Appellate Division, a Superior Court Division, and a District Court Division.

Editor's Note. — The provisions of this section are similar to those of Art. IV, § 2, Const. 1868, as that article was rewritten in 1962, and the cases in the following annotation were decided under that section.

The superior court is a court of general jurisdiction and has jurisdiction in all actions for personal injuries caused by negligence, except where its jurisdiction is divested by statute. *Morse v. Curtis*, 276 N.C. 371, 172 S.E.2d 495 (1970).

Courts Constituting General Court of Justice.—The General Court of Justice consists exclusively of the courts constituting the appellate, superior court and district court divisions thereof. *State v. Matthews*, 270 N.C. 35, 153 S.E.2d 791 (1967).

Police officer is not an official of the General Court of Justice. *State v. Matthews*, 270 N.C. 35, 153 S.E.2d 791 (1967).

Sec. 3. Judicial powers of administrative agencies. The General Assembly may vest in administrative agencies established pursuant to law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created. Appeals from administrative agencies shall be to the General Court of Justice.

Editor's Note. — The provisions of this section are similar to those of Art. IV, § 3, Const. 1868, as that article was rewritten in 1962, and the cases cited in the following annotation were decided under that section.

Judicial Power to Impose Penalty Granted to Commissioner of Insurance.—The attempted grant to the Commissioner of Insurance of judicial power to impose upon an insurance agent for a violation of the insurance laws a penalty, varying in the Commissioner's discretion from a nominal sum to \$25,000, violates this section, there being no reasonable necessity for conferring such judicial power

upon the Commissioner. *State ex rel. Lanier v. Vines*, 274 N.C. 486, 164 S.E.2d 161 (1968).

Agencies Are Not Courts.—Administrative agencies referred to in this section *ex vi termini* are distinguished from courts. They are not constituent parts of the General Court of Justice. *State ex rel. North Carolina Util. Comm'n v. Old Fort Finishing Plant*, 264 N.C. 416, 142 S.E.2d 8 (1965).

Police officer is not an administrative agency within the meaning of this section. *State v. Matthews*, 270 N.C. 35, 153 S.E.2d 791 (1967).

Sec. 4. Court for the Trial of Impeachments. The House of Representatives solely shall have the power of impeaching. The Court for the Trial of Impeachments shall be the Senate. When the Governor or Lieutenant Governor is impeached, the Chief Justice shall preside over the Court. A majority of the members shall be necessary to a quorum, and no person shall be convicted without the concurrence of two-thirds of the Senators present. Judgment upon conviction shall not extend beyond removal from and disqualification to hold office in this State, but the party shall be liable to indictment and punishment according to law.

Editor's Note.—The provisions of this section are similar to those of Art. IV, § 4,

Const. 1868, as that article was rewritten in 1962.

Sec. 5. Appellate division. The Appellate Division of the General Court of Justice shall consist of the Supreme Court and the Court of Appeals.

Cross Reference. — As to creation and organization of Court of Appeals, see G.S. § 7A-16.

section are similar to those of Art. IV, § 5, Const. 1868, as that article was rewritten in 1962 and as amended in 1965.

Editor's Note. — The provisions of this

Sec. 6. Supreme Court.

(1) **Membership.** The Supreme Court shall consist of a Chief Justice and six

Associate Justices, but the General Assembly may increase the number of Associate Justices to not more than eight. In the event the Chief Justice is unable, on account of absence or temporary incapacity, to perform any of the duties placed upon him, the senior Associate Justice available may discharge those duties.

(2) *Sessions of the Supreme Court.* The sessions of the Supreme Court shall be held in the City of Raleigh unless otherwise provided by the General Assembly.

Editor's Note.—The provisions of this Const. 1868, as that article was rewritten in section are similar to those of Art. IV, § 6, 1962.

Sec. 7. *Court of Appeals.* The structure, organization, and composition of the Court of Appeals shall be determined by the General Assembly. The Court shall have not less than five members, and may be authorized to sit in divisions, or other than en banc. Sessions of the Court shall be held at such times and places as the General Assembly may prescribe.

Editor's Note.—The provisions of this section are similar to those of Art. IV, § 6A, Const. 1868, as added in 1966.

Sec. 8. *Retirement of Justices and Judges.* The General Assembly shall provide by general law for the retirement of Justices and Judges of the General Court of Justice, and may provide for the temporary recall of any retired Justice or Judge to serve on the court from which he was retired.

Editor's Note.—This section is new with the Constitution of 1970.

Sec. 9. *Superior Courts.*

(1) *Superior Court districts.* The General Assembly shall, from time to time, divide the State into a convenient number of Superior Court judicial districts and shall provide for the election of one or more Superior Court Judges for each district. Each regular Superior Court Judge shall reside in the district for which he is elected. The General Assembly may provide by general law for the selection or appointment of special or emergency Superior Court Judges not selected for a particular judicial district.

(2) *Open at all times; sessions for trial of cases.* The Superior Courts shall be open at all times for the transaction of all business except the trial of issues of fact requiring a jury. Regular trial sessions of the Superior Court shall be held at times fixed pursuant to a calendar of courts promulgated by the Supreme Court. At least two sessions for the trial of jury cases shall be held annually in each county.

(3) *Clerks.* A Clerk of the Superior Court for each county shall be elected for a term of four years by the qualified voters thereof, at the same time and places as members of the General Assembly are elected. If the office of Clerk of the Superior Court becomes vacant otherwise than by the expiration of the term, or if the people fail to elect, the senior regular resident Judge of the Superior Court serving the county shall appoint to fill the vacancy until an election can be regularly held.

Editor's Note.—The provisions of this Const. 1868, as that article was rewritten section are similar to those of Art. IV, § 7, in 1962.

Sec. 10. *District Courts.* The General Assembly shall, from time to time, divide the State into a convenient number of local court districts and shall prescribe where the District Courts shall sit, but a District Court must sit in at least one place in each county. District Judges shall be elected for each district for a term of four years, in a manner prescribed by law. When more than one District Judge is authorized and elected for a district, the Chief Justice of the Supreme Court shall designate one of the judges as Chief District Judge. Every District Judge shall reside in the district for which he is elected. For each county, the senior regular resident Judge of the Superior Court serving the county shall appoint for a term of two years, from nominations submitted by the Clerk of the Superior Court of the county, one or more Magistrates who shall be officers of the District Court. The number

of District Judges and Magistrates shall, from time to time, be determined by the General Assembly. Vacancies in the office of District Judge shall be filled for the unexpired term in a manner prescribed by law. Vacancies in the office of Magistrate shall be filled for the unexpired term in the manner provided for original appointment to the office.

Editor's Note.—The provisions of this section are similar to those of Art. IV, § 8, Const. 1868, as that article was rewritten in 1962.

Sec. 11. *Assignment of Judges.* The Chief Justice of the Supreme Court, acting in accordance with rules of the Supreme Court, shall make assignments of Judges of the Superior Court and may transfer District Judges from one district to another for temporary or specialized duty. The principle of rotating Superior Court Judges among the various districts of a division is a salutary one and shall be observed. For this purpose the General Assembly may divide the State into a number of judicial divisions. Subject to the general supervision of the Chief Justice of the Supreme Court, assignment of District Judges within each local court district shall be made by the Chief District Judge.

Editor's Note.—The provisions of this section are similar to those of Art. IV, § 9, Const. 1868, as that article was rewritten in 1962, and the cases in the following annotation were decided under that section and under corresponding provisions of the article prior to its revision.

Judicial Notice of Assignment of Judges. —The Supreme Court will take judicial notice of the minute book showing the as-

signment of judges by the Chief Justice, and will take notice that the superior court judge holding the particular term of court in question had been assigned to hold said term. *Staton v. Blanton*, 259 N.C. 383, 130 S.E.2d 686 (1963).

Statutes Implementing Section. — See *Baker v. Varser*, 239 N.C. 180, 79 S.E.2d 757 (1954).

Sec. 12. *Jurisdiction of the General Court of Justice.*

(1) *Supreme Court.* The Supreme Court shall have jurisdiction to review upon appeal any decision of the courts below, upon any matter of law or legal inference. The jurisdiction of the Supreme Court over "issues of fact" and "questions of fact" shall be the same exercised by it prior to the adoption of this Article, and the Court may issue any remedial writs necessary to give it general supervision and control over the proceedings of the other courts.

(2) *Court of Appeals.* The Court of Appeals shall have such appellate jurisdiction as the General Assembly may prescribe.

(3) *Superior Court.* Except as otherwise provided by the General Assembly, the Superior Court shall have original general jurisdiction throughout the State. The Clerks of the Superior Court shall have such jurisdiction and powers as the General Assembly shall prescribe by general law uniformly applicable in every county of the State.

(4) *District Courts; Magistrates.* The General Assembly shall, by general law uniformly applicable in every local court district of the State, prescribe the jurisdiction and powers of the District Courts and Magistrates.

(5) *Waiver.* The General Assembly may by general law provide that the jurisdictional limits may be waived in civil cases.

(6) *Appeals.* The General Assembly shall by general law provide a proper system of appeals. Appeals from Magistrates shall be heard de novo, with the right of trial by jury as defined in this Constitution and the laws of this State.

I. General Consideration.

II. Supreme Court.

A. In General.

B. Claims against State.

I. GENERAL CONSIDERATION.

Editor's Note.—The provisions of this section are similar to those of Art. IV, §

10, Const. 1868, as that article was rewritten in 1962 and as amended in 1965. The cases in the following annotation were decided under that section, and under corresponding provisions of the article prior to its revision.

For survey of case law as to direct appeal to State Supreme Court from or-

der or decision of Utilities Commission, see 44 N.C.L. Rev. 890 (1966).

The superior court has original general jurisdiction throughout the State except as otherwise provided by the General Assembly. *State v. Wall*, 271 N.C. 675, 157 S.E.2d 363 (1967).

General Assembly is authorized by general law to prescribe jurisdiction and powers of district courts. *State v. Wall*, 271 N.C. 675, 157 S.E.2d 363 (1967).

II. SUPREME COURT.

A. In General.

Cross Reference.—For a thorough treatment of the appellate jurisdiction of the Supreme Court, see G.S. § 1-277 and note thereto.

The jurisdiction of the Supreme Court is conferred and defined by the Constitution, not by the General Assembly. *State ex rel. North Carolina Util. Comm'n v. Old Fort Finishing Plant*, 264 N.C. 416, 142 S.E.2d 8 (1965).

It Relates Solely to Appeals from Courts.—Under the present provisions of this article the appellate jurisdiction of the Supreme Court relates solely to appeals from decisions of "the courts below." *State ex rel. North Carolina Util. Comm'n v. Old Fort Finishing Plant*, 264 N.C. 416, 142 S.E.2d 8 (1965).

The Supreme Court is an appellate court. Its function, under the Constitution, is to review alleged errors and rulings of the trial court, and unless and until it is shown that a trial court ruled on a particular question, it is not given for the Supreme Court to make specific rulings thereon. *Greene v. Spivey*, 236 N.C. 435, 73 S.E.2d 488 (1952).

And Does Not Include Direct Appeals from Agencies.—Under this section, the jurisdiction of the Supreme Court is to review on appeal decisions "of the courts below." This does not include jurisdiction to review on direct appeal the decisions of administrative agencies. *State ex rel. North Carolina Util. Comm'n v. Old Fort Finishing Plant*, 264 N.C. 416, 142 S.E.2d 8 (1965).

The Supreme Court has supervisory jurisdiction over the lower courts and will exercise this jurisdiction in order that the case may be tried on the correct theory below and unnecessary delay in the administration of justice be thereby prevented. *Greene v. Charlotte Chem. Labs., Inc.*, 254 N.C. 680, 120 S.E.2d 82 (1961).

The Supreme Court has general supervisory authority over the orders, judgments, and decrees of the superior courts of the State and this is a prerogative which, in a

proper case, when necessary to promote the expeditious administration of justice, the Supreme Court will not hesitate to exercise. *Park Terrace, Inc. v. Phoenix Indem. Co.*, 243 N.C. 595, 91 S.E.2d 584 (1956); *Brice v. Robertson House Moving, Wrecking & Salvage Co.*, 249 N.C. 74, 105 S.E.2d 439 (1958).

And May Determine Sufficiency of Amended Complaint.—The Supreme Court, in the exercise of its supervisory jurisdiction, may determine the sufficiency of an amended complaint, including matters stricken therefrom in the lower court, as though a demurrer *ore tenus* to the amended complaint in its entirety had been lodged in the Supreme Court, and its ruling that the pleading, thus considered, is insufficient to state a cause of action necessarily includes an affirmance of the order of the lower court sustaining the demurrer *ore tenus* to the amended complaint exclusive of the portions previously stricken out. *Philbrook v. Chapel Hill Housing Authority*, 269 N.C. 598, 153 S.E.2d 153 (1967).

And Decide Questions on the Merits.—The Supreme Court, in the exercise of its supervisory jurisdiction, may decide questions on the merits, even though the procedure prescribed by the rules of practice as necessary to present such questions has not been followed. *Eastern Steel Prods. Corp. v. Chestnutt*, 252 N.C. 269, 113 S.E.2d 587 (1960).

Where the lower court holds the statute attacked by defendant to be unconstitutional, the Supreme Court, in the exercise of its supervisory jurisdiction over the inferior courts, may consider the constitutional questions notwithstanding that defendant failed properly to present them in the lower court, but even so the Supreme Court will ordinarily consider only the specific constitutional questions discussed in the brief. *Rice v. Rigsby*, 259 N.C. 506, 131 S.E.2d 469 (1963).

In the exercise of the constitutional power vested in the Supreme Court to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts, it overlooked defendant's failure to designate the specific constitutional provisions that he contended chapter 358, 1955 Session Laws, violated, and considered the question, even though the procedure prescribed by the rules of practice as necessary to present such question had not been followed. *Rice v. Rigsby*, 259 N.C. 506, 131 S.E.2d 469 (1963).

Ordinarily, the Supreme Court will not consider questions not properly presented

by objections duly made, exceptions duly entered, and assignments of error properly set out, though it may do so in exceptional circumstances in the exercise of its supervisory and controlling jurisdiction over the proceedings of the other courts vested in it by this section. *State v. Hewett*, 270 N.C. 348, 154 S.E.2d 476 (1967).

And Enforce Its Opinion and Mandate.

— When it comes to the attention of the Supreme Court that a lower court has failed to comply with the opinion of the Supreme Court, whether through insubordination, misinterpretation or inattention, the Supreme Court will, in the exercise of its supervisory jurisdiction, ex mero motu if necessary, enforce its opinion and mandate in accordance with the requirements of justice. *Collins v. Simms*, 257 N.C. 1, 125 S.E.2d 298 (1962).

What Reviewable. — On appeal to the Supreme Court, only error as to the law or legal inferences are reviewable upon the record in the case. *Merchants Nat'l Bank v. Howard*, 188 N.C. 543, 125 S.E. 126 (1924); *State v. Neill*, 244 N.C. 252, 93 S.E.2d 155 (1956). See also *Barnes v. Teer*, 218 N.C. 122, 10 S.E.2d 614 (1940); *McKay v. Bullard*, 219 N.C. 589, 14 S.E.2d 657 (1941).

The Supreme Court on appeal in a criminal action can review only matters of law or legal inference. *State v. Brewer*, 202 N.C. 187, 162 S.E. 363 (1932). See *State v. Anderson*, 208 N.C. 771, 182 S.E. 643 (1935).

The competency, admissibility and sufficiency of the evidence in a criminal action is for the court, the weight, effect and credibility is for the jury, and on appeal the Supreme Court can review only matters of law or legal inference. *State v. Casey*, 201 N.C. 185, 159 S.E. 337 (1931); *Debnam v. Rouse*, 201 N.C. 459, 160 S.E. 471 (1931); *Carter v. Mullinax*, 201 N.C. 783, 161 S.E. 486 (1931); *Woody Bros. Bakery v. Greensboro Life Ins. Co.*, 201 N.C. 816, 161 S.E. 554 (1931); *State v. Harrell*, 203 N.C. 210, 165 S.E. 551 (1932); *State v. Whiteside*, 204 N.C. 710, 169 S.E. 711 (1933).

This section empowers the Supreme Court to review on appeal any decision of the courts below, upon any matter of law or legal inference; and this is to be presented in accordance with the mandatory rules of the Supreme Court. *State v. Bittings*, 206 N.C. 798, 175 S.E. 299 (1934). See *State v. Jackson*, 211 N.C. 202, 189 S.E. 510 (1937).

"Issues of Fact" Defined.—"Issues of fact" has been defined to mean "such matters of fact as are put in issue by the pleadings, and a decision of which would be

final and conclude the parties upon the matters in controversy in the issue." *Battle v. Mayo*, 102 N.C. 413, 9 S.E. 384 (1889).

Review of Issues of Fact.—The jurisdiction of the Supreme Court over issues of fact, under this section, will be assumed upon two conditions: 1. If the matter be of such an equitable nature as a court of equity under the former system took exclusive cognizance of. 2. If the proofs are written and documentary and in all respects the same as they were when the judge of the court below passed upon them. *Worthy v. Shields*, 90 N.C. 192 (1884). See *Keener v. Finger*, 70 N.C. 35 (1874).

This prohibition of trials of "issues of fact" by the Supreme Court extends to issues of fact as heretofore understood, and does not hinder that tribunal from trying such questions of fact as may be involved in a consideration of the propriety of continuing or vacating an order for a provisional injunction. *Heilig v. Stokes*, 63 N.C. 612 (1869).

The Supreme Court cannot consider a paper which, unrelated to the trial, purports upon its face to have raised an issue of facts after the adjournment as to the recitals set forth in the commission given the presiding judge. *State v. Graham*, 194 N.C. 459, 140 S.E. 26 (1927).

Theory of Trial in Lower Court Is Adhered to.—The principle that an appeal will be determined in accordance with the theory of trial in the lower court, is enforced by the Supreme Court because of its limited jurisdiction as an appellate court under this section. *Apostle v. Acacia Mut. Life Ins. Co.*, 208 N.C. 95, 179 S.E. 444 (1935). See *Ammons v. Fisher*, 208 N.C. 712, 182 S.E. 479 (1935).

Subsection (6) refers to a system of appeals from a lower court to a higher court within the General Court of Justice. *State ex rel. North Carolina Util. Comm'n v. Old Fort Finishing Plant*, 264 N.C. 416, 142 S.E.2d 8 (1965).

Remedial Writs Controlling Proceedings of Inferior Courts.—The Supreme Court is vested with authority to issue any remedial writ necessary to give it general supervision and control over the proceedings of inferior courts. *State v. Cochran*, 230 N.C. 523, 53 S.E.2d 663 (1949).

Where an order of the superior court makes no ruling on exceptions to an order of the Public Utilities Commission, but remands the cause to the Commission for a determination, after further proceedings, of the precise question it had theretofore considered and decided, without specifying the ground on which the court's order is based, the Supreme Court, under the circum-

stances, in the exercise of its power under this section to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts, will vacate the court's order and remand the cause to the superior court for consideration and decision of the questions raised by protestants' exceptions to the Commission's findings and order. *State ex rel. Utilities Comm'n v. Maybelle Transp. Co.*, 252 N.C. 776, 114 S.E.2d 768 (1960).

The Supreme Court has the power to issue any remedial writ necessary to give it general supervision and control over proceedings of the lower courts and to this end will grant certiorari to review an order of the superior court ordering the State to pay attorney's fees for representation of an indigent defendant in the federal courts which involves a question of public importance. *State v. Davis*, 270 N.C. 1, 153 S.E.2d 749 (1967).

Habeas Corpus.—No appeal to the Supreme Court lies upon the refusal of the judge, having jurisdiction, to release the petitioner in habeas corpus proceedings, except in cases concerning the care and custody of children, the remedy being by application for the writ of certiorari which lies in the discretion of the appellate court. *State v. Yates*, 183 N.C. 753, 111 S.E. 337 (1922); *State v. Hooker*, 183 N.C. 763, 111 S.E. 351 (1922); *In re Blake*, 184 N.C. 278, 114 S.E. 294 (1922).

A decree in habeas corpus proceedings to determine the custody of a child as between its divorced parents is not appealable, the sole remedy being by certiorari to invoke the constitutional power of the Supreme Court to supervise and control proceedings of inferior courts. *In re Ogden*, 211 N.C. 100, 189 S.E. 119 (1937).

Although petitioner's purported appeal from a judgment rendered on return to a writ of habeas corpus would ordinarily have been dismissed, it was treated as a petition for writ of certiorari by the Supreme Court in *In re Renfrow*, 247 N.C. 55, 100 S.E.2d 315 (1957), in order that an important question presented by the record might be clarified.

Writ of Error Coram Nobis.—The Supreme Court, in its supervisory power, has authority to entertain a petition for permission to apply to the superior court for a writ of error coram nobis. *In re Taylor*, 230 N.C. 566, 53 S.E.2d 857 (1949); *State v. Daniels*, 231 N.C. 17, 56 S.E.2d 2 (1949). As to allowance of petition where trial court failed to appoint counsel, see note to G.S. § 15-4.

Writ of Certiorari. — Where an appli-

cation for writ of certiorari in the nature of a writ of error is made for the purpose of bringing up an appeal when the right of appeal is lost in the trial court by failure to file statement of case on appeal within the time allowed, applicant must negative laches and show merit. *State v. Moore*, 210 N.C. 686, 188 S.E. 421 (1936).

Where the case is not one in which the alleged error appears on the face of the record proper, which might be corrected in Supreme Court's supervisory power under this section, but it is to review a ruling of the court entered on motion after trial, as well as an application for certiorari, it was held that since the case was one in which the State had no right of appeal, a dismissal must necessarily follow. *State v. Todd*, 224 N.C. 776, 32 S.E.2d 313 (1944).

Caveat to Will. — Under the provisions of this section the Supreme Court on appeal from an issue of *devisavit vel non*, involved in the trial of a caveat to a will, is confined to a consideration of assignments of error in matters of law and legal inference. *In re Will of Brown*, 194 N.C. 583, 140 S.E. 192 (1927).

Determination of Matter Where Appeal Premature.—Where an order of the superior court is interlocutory, and an appeal therefrom to the Supreme Court is premature and is subject to dismissal, the Supreme Court in the exercise of its supervisory jurisdiction may nevertheless, in proper instances, determine the matter in order to obviate a wholly unnecessary and circuitous course of procedure. *Edwards v. City of Raleigh*, 240 N.C. 137, 81 S.E.2d 273 (1954); *Kelly v. Piper*, 243 N.C. 54, 89 S.E.2d 764 (1955).

Correcting Error in Judgment Where Appeal Subject to Dismissal.—Even though an appeal may be subject of dismissal, if the proceeding is in rem and the judgment entered in the court below vitally affects the title to real property, the Supreme Court will take jurisdiction for the purpose of correcting an error in the judgment. This can be done in the exercise of its supervisory power. *Ange v. Ange*, 235 N.C. 506, 71 S.E.2d 19 (1952); *Edwards v. Butler*, 244 N.C. 205, 92 S.E.2d 922 (1956).

B. Claims against State.

Purpose.—The original jurisdiction conferred upon the Supreme Court by this section is for the benefit only of such plaintiffs, and to be used only in such cases, as cannot otherwise obtain a footing in court by reason of the State being a party. *Bain v. State*, 86 N.C. 49 (1882).

It was intended by the provision of this section that persons who asserted that they

held legal claims against the sovereign State, should here find a tribunal before which they might have, in proper cases, the legality of their claims adjudicated—a tribunal before which the sovereign State would, for a certain purpose, abdicate the privilege of exemption from liability to be sued and appear as any other litigant, to the end that its liability to the petitioner might be determined by the law. *Cowles v. State*, 115 N.C. 173, 20 S.E. 384 (1894).

Jurisdiction Recommendatory Only. — The original jurisdiction given the Supreme Court to pass upon claims against the State or its subordinate agencies of government, which are not subject to suit or execution under judgment, are recommendatory to the legislature only, as to the matters of law involved upon facts agreed to, or made to appear, and this court does not pass upon conflicting evidence to determine the facts at issue. *Calkins Dredging Co. v. State*, 191 N.C. 243, 131 S.E. 665 (1926); *Sale v. State Highway & Pub. Works Comm'n*, 242 N.C. 612, 89 S.E.2d 290 (1955). See also *Rotan v. State*, 195 N.C. 291, 141 S.E. 733 (1928).

Only Way State Can Be Sued. — The State cannot be sued, except as provided in this section. *Burton v. Furman*, 115 N.C. 166, 20 S.E. 443 (1894); *Carpenter v. Atlanta & C. Air Line Ry.*, 184 N.C. 400, 114 S.E. 693 (1922).

Neither the State nor its subordinate agencies of government may be subject to suits or actions against it or them in its own courts or the courts of other states unless it has expressly consented to such suit. *Calkins Dredging Co. v. State*, 191 N.C. 243, 131 S.E. 665 (1926).

The jurisdiction of the Supreme Court to hear claims against the State is confined to the powers given by this section and is not enlarged by the rules of procedure prescribed by statute, and where the complaint presents only an issue of fact the proceeding will be dismissed. *Cahoon v. State*, 201 N.C. 312, 160 S.E. 183 (1931).

A state cannot be sued in its own courts or elsewhere unless it has consented to such suit, by statutes or in cases authorized by provisions of the organic law, instanced by this section and Art. III of the U.S. Constitution. *Dalton v. State Highway & Pub. Works Comm'n*, 223 N.C. 406, 27 S.E.2d 1 (1943).

What Examination Confined to.—The jurisdiction conferred upon the Supreme Court by this section to hear claims against the State is confined to an examination of and adjudication of the legal validity of such claims; no power to enforce its judg-

ment is given the court; its decisions are merely recommendatory to the legislature, who may provide for the judgment of the claims, if it sees proper to do so. *Baltzer v. State*, 104 N.C. 265, 10 S.E. 153 (1889).

Kind of Claims Reviewed. — The claim against the State must be such as, against any other defendant, could be reduced to judgment and enforced by execution. *Bain v. State*, 86 N.C. 49 (1882).

Necessity of Question of Law.—The Supreme Court has not original jurisdiction to hear claims against the State in cases in which no question of law is involved. *Bledsoe v. State*, 64 N.C. 392 (1870); *Miller v. State*, 134 N.C. 270, 46 S.E. 514 (1904).

The Supreme Court will not recommend to the legislature the payment of a claim against the State, when no questions of law are involved, or when such questions are resolved against the claimant. *Calkins Dredging Co. v. State*, 191 N.C. 243, 131 S.E. 665 (1926).

A claimant against the State is not entitled to the recommendatory jurisdiction of the Supreme Court upon petition presented to it under the provisions of this section when no question of law is presented by the facts in the petition. *Warren v. State*, 199 N.C. 211, 153 S.E. 864 (1930).

Repeal of Statute.—The repeal of a statute under which a contract has been made between the plaintiff and the State in no way affects the plaintiff's rights under the contract. *Clements v. State*, 76 N.C. 199 (1877).

Matters of Small Value. — This section ought not to be invoked in matters of small value, particularly when there is no doubt about the law. The claimant should apply at once to the legislature for relief. *Sinclair v. State*, 69 N.C. 47 (1873).

Suit against Agent of State. — A suit prosecuted against an officer or agent who represented the State in conduct and liability, and wherein the State is the real party whose action will be controlled by the judgment and against which relief is sought, is a suit against the State, and not against its officer or agent, whose acts are alleged to have caused the injury complained of. *Carpenter v. Atlanta & C. Air Line Ry.*, 184 N.C. 400, 114 S.E. 693 (1922).

Action by Clerk for Fees. — The Supreme Court has not original jurisdiction of an action against the State by a clerk of the superior court for fees in an action instituted by the State and for which it has been adjudged liable. *Miller v. State*, 134 N.C. 270, 46 S.E. 514 (1904).

Holder of State Bonds.—An owner and

holder of a bond of the State and coupons past due thereon has a right to invoke the recommendatory jurisdiction of the Supreme Court to pass upon the validity of the coupons as a claim against the State, under this section. *Horne v. State*, 82 N.C. 382 (1880).

Issues of Fact.—The Supreme Court in the exercise of its recommendatory original jurisdiction to hear claims against the State will dismiss any action brought against the State where the sole issue is

one of fact. *Lacy v. State*, 195 N.C. 284, 141 S.E. 886 (1928).

A claim against the State Highway Commission for damages arising from an alleged breach of contract in the building of a State highway is a claim against the State, but when the only issues presented therein are ones of fact, the Supreme Court will not exercise its recommendatory original jurisdiction, and the action will be dismissed. *Lacy v. State*, 195 N.C. 284, 141 S.E. 886 (1928).

Sec. 13. *Forms of action; rules of procedure.*

(1) *Forms of Action.* There shall be in this State but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which shall be denominated a civil action, and in which there shall be a right to have issues of fact tried before a jury. Every action prosecuted by the people of the State as a party against a person charged with a public offense, for the punishment thereof, shall be termed a criminal action.

(2) *Rules of procedure.* The Supreme Court shall have exclusive authority to make rules of procedure and practice for the Appellate Division. The General Assembly may make rules of procedure and practice for the Superior Court and District Court Divisions, and the General Assembly may delegate this authority to the Supreme Court. No rule of procedure or practice shall abridge substantive rights or abrogate or limit the right of trial by jury. If the General Assembly should delegate to the Supreme Court the rule-making power, the General Assembly may, nevertheless, alter, amend, or repeal any rule of procedure or practice adopted by the Supreme Court for the Superior Court or District Court Divisions.

Editor's Note.—The provisions of this section are similar to those of Art. IV, § 11, Const. 1868, as that article was rewritten in 1962. The cases in the following annotation were decided under that section, and under corresponding provisions of the article prior to its revision.

Effect of Section. — This section abolished the distinction between actions at law and suits in equity, leaving such rights and remedies to be enforced in the one court, which theretofore had administered simply legal rights. *Peebles v. Gay*, 115 N.C. 38, 20 S.E. 173 (1894). See *Reynolds v. Reynolds*, 208 N.C. 578, 182 S.E. 341 (1935).

Under this section and former Art. IV, § 20 of the Constitution of 1868, the superior courts became the successors of the courts of equity, having their jurisdiction and exercising their equitable powers unless restrained by statute. In *re Estate of Smith*, 200 N.C. 272, 156 S.E. 494 (1931).

Legal and equitable rights and remedies are now determined in one and the same action. *Woodall v. North Carolina Joint Stock Land Bank*, 201 N.C. 428, 160 S.E. 475 (1931).

Distinction between Principles Not Abolished.—Equity is now administered in the same courts as matters of law, but the

distinction between equitable and legal principles have not been abolished. *Waters v. Garriss*, 188 N.C. 305, 124 S.E. 334 (1924); *Furst v. Merritt*, 190 N.C. 397, 130 S.E. 40 (1925); *Page Trust Co. v. Godwin*, 190 N.C. 512, 130 S.E. 323 (1925).

This section, abolishing the distinctions between actions at law and suits in equity, does not imply that the distinctions as between law and equity are abolished. Principles of law, principles and doctrines of equity, remain the same as they have ever been; the change wrought is in the method of administering them and, in some degree, the extent of the application of them. The abolition does not destroy equitable rights and remedies, nor does it merge legal and equitable rights. *Scales v. Wachovia Bank & Trust Co.*, 195 N.C. 772, 143 S.E. 868 (1928).

Equitable Rights Enforced by Civil Action.—Since the passage of this section the enforcement of an equitable right, as that of subrogation, can only be maintained by a civil action. *Calvert v. Peebles*, 82 N.C. 334 (1880).

"Criminal Action" and "Indictment" Synonymous.—The term "criminal action" and "indictment" as used in the Constitution, and in the General Statutes are synonymous: Therefore, it would be

equally regular to entitle a case upon the records of the court, either as "the People v. A.B.—Criminal action," or the "State v. A.B.—Indictment." *State v. Simons*, 68 N.C. 378 (1873).

Rights of Prior Lienor Not Affected.—

This section does not affect the rights of a prior lienor by a registered chattel mortgage in favor of a judgment creditor who has sold the personal property by execution under a judgment subsequent to the mortgage lien, or give the creditor a right to levy his execution instead of pursuing the equitable remedy. *Rowland Hdwe. & Supply Co. v. Lewis*, 173 N.C. 290, 92 S.E. 13 (1917).

Defendant's Right to Know Nature of Demand. — The necessity for drawing pleadings in civil actions according to a prescribed or established precedent, ceased when the form of suits was abolished by this section. But one who is brought into court to answer a demand for damages or for specific property, has the same fundamental right to know the nature of the demand sufficiently well to enable him, with the aid of competent counsel, to prepare his defense, that he has to be informed of the accusation for which he has to answer criminally. *Conley v. Richmond & D.R.R.*, 109 N.C. 692, 14 S.E. 303 (1891).

Asking for Ancillary Remedy. — There being but one form of action in civil cases, the fact that a plaintiff asks for one of the many remedies ancillary thereto, to which he is not entitled, does not affect the action itself, which will go on if he is entitled to any other of the remedies. *Hargrove v. Harris*, 116 N.C. 418, 21 S.E. 916 (1895).

Pleadings Amended by Court.—Where a good cause of action is stated for equitable relief, but defective in form, the court may

require the pleadings to be made definite and certain by amendment, the distinction between suits in equity and actions at law as to jurisdictional matters being abolished by this section. *Green v. Harshaw*, 187 N.C. 213, 121 S.E. 456 (1924).

Enforcement of Contracts.—The remedy for the enforcement of all kinds of contracts is now a civil action. *Boles v. Caudle*, 133 N.C. 528, 45 S.E. 835 (1903).

This section providing that legal and equitable remedies be administered in the same court, does not abolish the recognized distinction in the principles applicable to each; and an action to enforce the provisions of a contract, being one at law, the equity that time is not the essence of the contract has no application. *Makuen v. Elder*, 170 N.C. 510, 87 S.E. 334 (1915).

Action for Money Had and Received.—

Under this section an exception to a complaint that by its form it is for money had and received, and that the action cannot be maintained unless the money has been actually received, is untenable. *Staton v. Webb*, 137 N.C. 35, 49 S.E. 55 (1904).

Action for Claim and Delivery. — There is no such thing as an action for claim and delivery. Under this section there is but one form of action in civil cases. *Hargrove v. Harris*, 116 N.C. 418, 21 S.E. 916 (1895).

Mandamus.—There is now in this State but one form of action, and the writ of mandamus is but a process of the court in that action. *August Belmont & Co. v. Reilly*, 71 N.C. 260 (1874).

The rules of the Court of Appeals are mandatory and not directory. *State v. Black*, 7 N.C. App. 324, 172 S.E.2d 217 (1970).

Sec. 14. Waiver of jury trial. In all issues of fact joined in any court, the parties in any civil case may waive the right to have the issues determined by a jury, in which case the finding of the judge upon the facts shall have the force and effect of a verdict by a jury.

Cross Reference.—For a thorough treatment of waiver of jury trial, see G.S. § 1A-1, Rules 39, 52 and 53, and notes thereto.

Editor's Note.—The provisions of this section are similar to those of Art. IV, § 12, Const. 1868, as that article was rewritten in 1962. The cases in the following annotation were decided under that section, and under corresponding provisions of the article prior to its revision.

In Civil Actions.—The right to trial by jury in civil cases may be waived. *Cheson v. Kieckhefer Container Co.*, 223 N.C. 378, 26 S.E.2d 904 (1943); *Simmons v. Lee*, 230 N.C. 216, 53 S.E.2d 79 (1949). As

to waiver in reference cases, see note to G.S. § 1A-1, Rule 53.

It was error for a trial court to determine issues of fact raised by the pleadings in the absence of waiver of the constitutional and statutory right to a trial by jury, there being no question of reference. *Sparks v. Sparks*, 232 N.C. 492, 61 S.E.2d 356 (1950).

Manner of Waiver Controlled by Statute. — See *Holmes Elec. Co. v. Carolina Power & Light Co.*, 197 N.C. 766, 150 S.E. 621 (1929). See also *Green Sea Lumber Co. v. Pemberton*, 188 N.C. 532, 125 S.E. 119 (1924).

Waiver by Agreement.—Where the case on appeal recites that the parties agreed that the court might render judgment out of term and out of the district, and the judgment recites the same, appellant's contention that trial by the court had not been agreed upon cannot be sustained, since trial by jury would be impossible under the agreement that judgment might be rendered out of term and out of the district. *Odom v. Palmer*, 209 N.C. 93, 182 S.E. 741 (1935).

Waiver by Consent to Pay Additur. — While it may be suggested that the practice of additur deprives a defendant of his constitutional right to a jury trial, guaranteed by Art. I, § 25, the obvious answer is that the defendant can waive that right, which he does when he consents to pay the additur, since in this State the parties to a civil action have a right to waive a jury trial. *Caudle v. Swanson*, 248 N.C. 249, 103 S.E.2d 357 (1958).

Judge Has No Authority to Affirm Order of Assistant Clerk Which Effectively Determines Issue of Fact.—Where there is nothing in the record to indicate that petitioner and respondent have waived their constitutional and statutory right to have the issue of fact joined on the pleadings tried by a jury, and there is no question of reference, the judge had no authority to enter an order affirming the order of the assistant clerk of the superior court, which in effect was a determination by the judge of the issue of fact raised by the pleadings and a finding by him that money deposited in the office of the clerk of the superior court was funds belonging to a decedent and an order that said money be distributed to the administrator c.t.a. of her last will and testament. *In re Estate of Wallace*, 267 N.C. 204, 147 S.E.2d 922 (1966).

Attachment Proceedings.—In attachment and other ancillary proceedings it is competent for the court to find the facts from the affidavits and other evidence; and a party consenting to this mode of trial cannot afterwards demand a jury trial. *Pasour v. Linberger*, 90 N.C. 159 (1884).

Sec. 15. *Administration.* The General Assembly shall provide for an administrative office of the courts to carry out the provisions of this Article.

Editor's Note.—The provisions of this section are similar to those of Art. IV, § 13,

Special Proceeding to Establish Boundary Line.—As to defendant's waiver of jury trial by failure to tender pertinent issues, see *Simmons v. Lee*, 230 N.C. 216, 53 S.E.2d 79 (1949).

Acts Constituting Waiver after Compulsory Reference. — See note to G.S. § 1A-1, Rule 53.

Party with Right to Traverse Allegations Cannot Be Deprived of Jury Trial. — A party charged with the maintenance of a public nuisance, as defined by G.S. § 19-1, has a right to traverse the factual allegations of the complaint. If he does so, he cannot be deprived of his right to a jury trial on the issues raised by the pleadings. *State ex rel. Bowman v. Malloy*, 264 N.C. 396, 141 S.E.2d 796 (1965).

Findings of Court Are Conclusive. — Where a jury trial is waived, the findings by the court upon conflicting evidence are conclusive under this section, and are not subject to review upon appeal. *Barringer v. Wilmington Sav. & Trust Co.*, 207 N.C. 505, 177 S.E. 795 (1935).

When the right to a jury trial is waived, the facts found by the judge have the force and effect of a verdict by a jury. Upon appropriate assignments of error the Supreme Court may examine the evidence to ascertain if there be any to support the verdict of a jury. It may likewise, upon appropriate assignments, ascertain if the verdict is sufficient to support the judgment, but it cannot enlarge or diminish findings which constitute the verdict. *Cauble v. Bell*, 249 N.C. 722, 107 S.E.2d 557 (1959).

The Supreme Court has the right to review findings of fact made with respect to interlocutory orders denying or granting injunctive relief. However, where the judgment is a final determination of the rights of the parties, the mere fact that equitable (injunctive) relief is granted gives the Supreme Court no authority to modify findings determinative of issues of fact raised by the pleadings. *Cauble v. Bell*, 249 N.C. 722, 107 S.E.2d 557 (1959).

Const. 1868, as that article was rewritten in 1962.

Sec. 16. *Terms of office and election of Justices of the Supreme Court, Judges of the Court of Appeals, and Judges of the Superior Court.* Justices of the Supreme Court, Judges of the Court of Appeals, and regular Judges of the Superior Court shall be elected by the qualified voters and shall hold office for terms of eight years and until their successors are elected and qualified. Justices of the Supreme Court and Judges of the Court of Appeals shall be elected by the qualified voters of the

State. Regular Judges of the Superior Court may be elected by the qualified voters of the State or by the voters of their respective districts, as the General Assembly may prescribe.

Editor's Note.—The provisions of this Const. 1868, as that article was rewritten section are similar to those of Art. IV, § 14, in 1962.

Sec. 17. *Removal of judicial officers.*

(1) *Justices of Supreme Court, Judges of the Court of Appeals, and Judges of Superior Court.* Any Justice of the Supreme Court, Judge of the Court of Appeals, or Judge of the Superior Court may be removed from office for mental or physical incapacity by joint resolution of two-thirds of all the members of each house of the General Assembly. Any Justice or Judge against whom the General Assembly may be about to proceed shall receive notice thereof, accompanied by a copy of the causes alleged for his removal, at least twenty days before the day on which either house of the General Assembly shall act thereon. Removal from office for any other cause shall be by impeachment.

(2) *District Judges and Magistrates.* The General Assembly shall provide by general law for the removal of District Judges and Magistrates for misconduct or mental or physical incapacity.

(3) *Clerks.* Any Clerk of the Superior Court may be removed from office for misconduct or mental or physical incapacity by the senior regular resident Superior Court Judge serving the county. Any Clerk against whom proceedings are instituted shall receive written notice of the charges against him at least ten days before the hearing upon the charges. Any Clerk so removed from office shall be entitled to an appeal as provided by law.

Editor's Note.—The provisions of this Const. 1868, as that article was rewritten section are similar to those of Art. IV, § 15, in 1962.

Sec. 18. *Solicitors and solicitorial districts.*

(1) *Solicitors.* The General Assembly shall, from time to time, divide the State into a convenient number of solicitorial districts, for each of which a Solicitor shall be chosen for a term of four years by the qualified voters thereof, at the same time and places as members of the General Assembly are elected. The Solicitor shall advise the officers of justice in his district, be responsible for the prosecution on behalf of the State of all criminal actions in the Superior Courts of his district, perform such duties related to appeals therefrom as the Attorney General may require, and perform such other duties as the General Assembly may prescribe.

(2) *Prosecution in District Court Division.* Criminal actions in the District Court Division shall be prosecuted in such manner as the General Assembly may prescribe by general law uniformly applicable in every local court district of the State.

Editor's Note.—The provisions of this section are similar to those of Art. IV, § 16, Const. 1868, as that article was rewritten in 1962.

A solicitor is the most responsible officer of the court and has been spoken of as "its right arm." He is a constitutional officer

and his duties are presented by the Constitution. *State v. McAfee*, 189 N.C. 320, 127 S.E. 204 (1925); *State v. Carden*, 209 N.C. 404, 183 S.E. 898 (1936), decided under Art. IV, § 23, Const. 1868, prior to the 1962 revision of the article.

Sec. 19. *Vacancies.* Unless otherwise provided in this Article, all vacancies occurring in the offices provided for by this Article shall be filled by appointment of the Governor, and the appointees shall hold their places until the next election for members of the General Assembly that is held more than 30 days after the vacancy occurs, when elections shall be held to fill the offices. When the unexpired term of any of the offices named in this Article of the Constitution in which a vacancy has occurred, and in which it is herein provided that the Governor shall fill the vacancy, expires on the first day of January succeeding the next election for members of the General Assembly, the Governor shall appoint to fill that vacancy for the unexpired term of the office. If any person elected or appointed to any of

these offices shall fail to qualify, the office shall be appointed to, held, and filled as provided in case of vacancies occurring therein. All incumbents of these offices shall hold until their successors are qualified.

Editor's Note.—The provisions of this section are similar to those of Art. IV, § 17, Const. 1868, as that article was rewritten in 1962. The cases in the following annotation were decided under Art. IV, § 25, Const. 1868, prior to the 1962 revision of the article.

Concurrence of Senate Unnecessary. — The general appointing power is given to the Governor with the concurrence of the Senate; the power to fill vacancies, not otherwise provided for, is given to the Governor alone, and that, whether the legislature is in session or not, and without calling the Senate. *Nichols v. McKee*, 68 N.C. 429 (1873).

Sec. 20. *Revenues and expenses of the judicial department.* The General Assembly shall provide for the establishment of a schedule of court fees and costs which shall be uniform throughout the State within each division of the General Court of Justice. The operating expenses of the judicial department, other than compensation to process servers and other locally paid non-judicial officers, shall be paid from State funds.

Editor's Note.—The provisions of this section are similar to those of Art. IV, §

Refusal of Judge to Accept Office. — Where a person was elected judge of the superior court and declined to accept the office and never qualified there was a vacancy within the meaning of this section and the Governor had the power to fill such vacancy by appointing a successor. *People ex rel. Cloud v. Wilson*, 72 N.C. 155 (1875).

Constables Not Included. — The provision in this section that "all incumbents of these offices shall hold until their successors are qualified," does not embrace the office of constable. *State ex rel. King v. McLure*, 84 N.C. 153 (1881).

18, Const. 1868, as that article was rewritten in 1962.

Sec. 21. *Fees, salaries, and emoluments.* The General Assembly shall prescribe and regulate the fees, salaries, and emoluments of all officers provided for in this Article, but the salaries of Judges shall not be diminished during their continuance in office. In no case shall the compensation of any Judge or Magistrate be dependent upon his decision or upon the collection of costs.

Cross Reference.—See G.S. § 138-1 et seq., and note thereto.

Editor's Note.—The provisions of this section are similar to those of Art. IV, § 19, Const. 1868, as that article was rewritten in 1962. The cases in the following annotation were decided under Art. IV, § 18, Const. 1868, prior to the 1962 revision of the article.

Prohibition of Salary Diminution Applies to Constitutional Courts. — The provision of this section that the salaries of judges shall not be diminished during their continuance in office applies only to judges of courts existing by virtue of the Constitution and not to those established by legislative enactment. *Efrd. v. Board of Comm'rs*, 219 N.C. 96, 12 S.E.2d 889 (1941).

The legislature may designate the compensation of these officials prior to the be-

ginning of their terms and it should follow that the compensation may be declared a certain amount less the income tax on that amount. See G.S. § 105-141. 11 N.C.L. Rev. 256.

Duty of Supreme Court to Pass upon Right of Judge to Exemption.—It is the duty of the Supreme Court to pass upon the rights of one of the judges of the State as a citizen thereof, when he, in a case properly presented, denies the constitutional right of the State or one of its designated agencies, to tax his salary paid to him as one of its judges. *Long v. Watts*, 183 N.C. 99, 110 S.E. 765 (1922).

Compensation for Holding Extra Term.—The additional compensation of one hundred dollars given to a superior court judge for services in holding a special term is a part of his salary. *Buxton v. Commissioners of Rutherford*, 82 N.C. 91 (1880).

ARTICLE V

FINANCE

Article Amended Effective July 1, 1973. — This article was rewritten by amendment

proposed by Session Laws 1969, c. 1200, s. 1, and adopted by vote of the people at

the general election held Nov. 3, 1970. The amended article, which will take effect July 1, 1973, reads as follows:

Article V

Finance

Section 1. *No capitation tax to be levied.* No poll or capitation tax shall be levied by the General Assembly or by any county, city or town, or other taxing unit.

Sec. 2. *State and local taxation.*

(1) *Power of taxation.* The power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away.

(2) *Classification.* Only the General Assembly shall have the power to classify property for taxation, which power shall be exercised only on a State-wide basis and shall not be delegated. No class of property shall be taxed except by uniform rule, and every classification shall be made by general law uniformly applicable in every county, city and town, and other unit of local government.

(3) *Exemptions.* Property belonging to the State, counties, and municipal corporations shall be exempt from taxation. The General Assembly may exempt cemeteries and property held for educational, scientific, literary, cultural, charitable, or religious purposes, and, to a value not exceeding \$300, any personal property. The General Assembly may exempt from taxation not exceeding \$1,000 in value of property held and used as the place of residence of the owner. Every exemption shall be on a State-wide basis and shall be made by general law uniformly applicable in every county, city and town, and other unit of local government. No taxing authority other than the General Assembly may grant exemptions, and the General Assembly shall not delegate the powers accorded to it by this subsection.

(4) *Special tax areas.* Subject to the limitations imposed by Section 4, the General Assembly may enact general laws authorizing the governing body of any county, city, or town to define territorial areas and to levy taxes within those areas, in addition to those levied throughout the county, city, or town, in order to finance, provide, or maintain services, facilities, and functions in addition to or to a greater extent than those financed, provided, or maintained for the entire county, city, or town.

(5) *Purposes of property tax.* The General Assembly shall not authorize any county, city or town, special district, or

other unit of local government to levy taxes on property, except for purposes authorized by general law uniformly applicable throughout the State, unless the tax is approved by a majority of the qualified voters of the unit who vote thereon.

(6) *Income tax.* The rate of tax on incomes shall not in any case exceed ten per cent and there shall be allowed the following minimum exemptions, to be deducted from the amount of annual incomes: to the income-producing spouse of a married couple living together, or to a widow or widower having minor child or children, natural or adopted, not less than \$2,000; to all other persons not less than \$1,000; and there may be allowed other deductions, not including living expenses, so that only net incomes are taxed.

(7) *Contracts.* The General Assembly may enact laws whereby the State, any county, city or town, and any other public corporation may contract with and appropriate money to any person, association, or corporation for the accomplishment of public purposes only.

Sec. 3. *Limitations upon the increase of State debt.*

(1) *Authorized purposes; two-thirds limitation.* The General Assembly shall have no power to contract debts secured by a pledge of the faith and credit of the State, unless approved by a majority of the qualified voters of the State who vote thereon, except for the following purposes:

- (a) to fund or refund a valid existing debt;
- (b) to supply an unforeseen deficiency in the revenue;
- (c) to borrow in anticipation of the collection of taxes due and payable within the current fiscal year to an amount not exceeding 50 per cent of such taxes;
- (d) to suppress riots or insurrections, or to repel invasions;
- (e) to meet emergencies immediately threatening the public health or safety, as conclusively determined in writing by the Governor;
- (f) for any other lawful purpose, to the extent of two-thirds of the amount by which the State's outstanding indebtedness shall have been reduced during the next preceding biennium.

(2) *Gift or loan of credit regulated.* The General Assembly shall have no power to give or lend the credit of the State in aid of any person, association, or corporation, except a corporation in which the State

has a controlling interest, unless the subject is submitted to a direct vote of the people of the State, and is approved by a majority of the qualified voters who vote thereon.

(3) *Definitions.* A debt is incurred within the meaning of this Section when the State borrows money. A pledge of the faith and credit within the meaning of this Section is a pledge of the taxing power. A loan of credit within the meaning of this Section occurs when the State exchanges its obligations with or in any way guarantees the debts of an individual, association, or private corporation.

(4) *Certain debts barred.* The General Assembly shall never assume or pay any debt or obligation, express or implied, incurred in aid of insurrection or rebellion against the United States. Neither shall the General Assembly assume or pay any debt or bond incurred or issued by authority of the Convention of 1868, the special session of the General Assembly of 1868, or the General Assemblies of 1868-69 and 1869-70, unless the subject is submitted to the people of the State and is approved by a majority of all the qualified voters at a referendum held for that sole purpose.

(5) *Outstanding debt.* Except as provided in subsection (4), nothing in this Section shall be construed to invalidate or impair the obligation of any bond, note, or other evidence of indebtedness outstanding or authorized for issue as of July 1, 1973.

Sec. 4. *Limitations upon the increase of local government debt.*

(1) *Regulation of borrowing and debt.* The General Assembly shall enact general laws relating to the borrowing of money secured by a pledge of the faith and credit and the contracting of other debts by counties, cities and towns, special districts, and other units, authorities, and agencies of local government.

(2) *Authorized purposes; two-thirds limitation.* The General Assembly shall have no power to authorize any county, city or town, special district, or other unit of local government to contract debts secured by a pledge of its faith and credit unless approved by a majority of the qualified voters of the unit who vote thereon, except for the following purposes:

- (a) to fund or refund a valid existing debt;
- (b) to supply an unforeseen deficiency in the revenue;
- (c) to borrow in anticipation of the collection of taxes due and payable within the current fiscal year to

an amount not exceeding 50 per cent of such taxes;

- (d) to suppress riots or insurrections;
- (e) to meet emergencies immediately threatening the public health or safety, as conclusively determined in writing by the Governor;
- (f) for purposes authorized by general laws uniformly applicable throughout the State, to the extent of two-thirds of the amount by which the unit's outstanding indebtedness shall have been reduced during the next preceding fiscal year.

(3) *Gift or loan of credit regulated.* No county, city or town, special district, or other unit of local government shall give or lend its credit in aid of any person, association, or corporation, except for public purposes as authorized by general law, and unless approved by a majority of the qualified voters of the unit who vote thereon.

(4) *Certain debts barred.* No county, city or town, or other unit of local government shall assume or pay any debt or the interest thereon contracted directly or indirectly in aid or support of rebellion or insurrection against the United States.

(5) *Definitions.* A debt is incurred within the meaning of this Section when a county, city or town, special district, or other unit, authority, or agency of local government borrows money. A pledge of faith and credit within the meaning of this Section is a pledge of the taxing power. A loan of credit within the meaning of this Section occurs when a county, city or town, special district, or other unit, authority, or agency of local government exchanges its obligations with or in any way guarantees the debts of an individual, association, or private corporation.

(6) *Outstanding debt.* Except as provided in subsection (4), nothing in this Section shall be construed to invalidate or impair the obligation of any bond, note, or other evidence of indebtedness outstanding or authorized for issue as of July 1, 1973.

Sec. 5. *Acts levying taxes to state objects.* Every act of the General Assembly levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other purpose.

Sec. 6. *Inviolability of sinking funds and retirement funds.*

(1) *Sinking funds.* The General Assembly shall not use or authorize to be used any part of the amount of any sinking fund for any purpose other than the retirement of the bonds for which the sinking fund

has been created, except that these funds may be invested as authorized by law.

(2) *Retirement funds.* Neither the General Assembly nor any public officer, employee, or agency shall use or authorize to be used any part of the funds of the Teachers' and State Employees' Retirement System or the Local Governmental Employees' Retirement System for any purpose other than retirement system benefits and purposes, administrative expenses, and refunds; except that retirement system funds may be invested as authorized by law, subject to the investment limitation that the funds of the Teachers' and State Employees' Retirement System and the Local Governmental Employees' Retirement

System shall not be applied, diverted, loaned to, or used by the State, any State agency, State officer, public officer, or public employee.

Sec. 7. *Drawing public money.*

(1) *State treasury.* No money shall be drawn from the State Treasury but in consequence of appropriations made by law, and an accurate account of the receipts and expenditures of State funds shall be published annually.

(2) *Local treasury.* No money shall be drawn from the treasury of any county, city or town, or other unit of local government except by authority of law.

Section 1. *Capitation tax.*

(1) *Capitation tax limited.* The General Assembly may levy a capitation tax on every male inhabitant of the State over 21 and under 50 years of age, not in excess of two dollars, and cities and towns may levy a capitation tax on persons subject to the State tax not in excess of one dollar. No other capitation tax shall be levied. The governing boards of the several counties and of the cities and towns may exempt from the capitation tax any special cases on account of poverty or infirmity.

(2) *Proceeds.* The proceeds of the State and county capitation tax shall be applied to the purposes of education and the support of the poor, but in no one fiscal year shall more than 25 percent thereof be appropriated to the latter purpose.

Editor's Note.—The provisions of subsection (1) of this section are similar to those of Art. V, § 1, Const. 1868, as amended in 1920, and the provisions of subsection (2) are similar to those of Art. V, § 2, Const. 1868. The cases in the following annotation were decided under those sections.

For article on property and poll tax limitations, see 18 N.C.L. Rev. 275.

The Constitution does not require that a capitation tax shall be levied for ordinary State and county purposes. *Jones v. Commissioners of Person County*, 107 N.C. 248, 12 S.E. 69 (1890).

Taxation for State and County Purposes Limited.—Taxation, for State and county purposes combined, for the current and necessary expenses of the county government and new debts, cannot exceed the constitutional limitation. *French v. Board of Comm'rs*, 74 N.C. 692 (1876); *Southern Ry. v. Board of Comm'rs*, 148 N.C. 220, 61 S.E. 690 (1908).

The Supreme Court, in 1885, held that county commissioners could not exceed the constitutional rate of taxation, even if the excess were necessary to operate the public schools. *Whiteville City Adm. Unit v. Columbus County Bd. of County Comm'rs*, 251 N.C. 826, 112 S.E.2d 539 (1960).

Without special legislation a county may

not authorize a levy of tax, exceeding the constitutional limitation upon the poll or property, to provide for a sinking fund to pay the principal and interest on bonds to be issued by it for highway purposes. *Bennett v. Board of Comm'rs*, 173 N.C. 625, 92 S.E. 603 (1917). See also *Ballou v. Road Comm'n*, 182 N.C. 473, 109 S.E. 628 (1921).

Special Tax for Road Purposes.—The limitation as to the levy on poll tax prescribed by this section does not apply to the levy of a special tax by a county for road purposes, authorized by the legislature submitted to the vote of the electors of the county and duly approved by them. *Moose v. Board of Comm'rs*, 172 N.C. 419, 90 S.E. 441 (1916).

A special school district may not impose a tax upon the polls for school purposes; and where a poll tax and a property tax have both been favorably voted for at an election held for the purpose, the tax upon the poll will be held unconstitutional and the property tax upheld by the courts. *Board of Educ. v. Bray Bros. Co.*, 184 N.C. 484, 115 S.E. 47 (1922).

Subsection (2) Only Applies to General Purposes.—An objection that an act applied a part of the county capitation tax to the use of the public roads in violation of this section, which appropriates the State

and county poll tax "to the purposes of education and the support of the poor," could not be sustained, as that provision applies to the levy of taxation for general, not special, purposes. *Crocker v. Moore*, 140 N.C. 429, 53 S.E. 229 (1906).

Percentage Devoted to School Purpose.—Not less than 75 percent of the capitation tax must be devoted to school purposes. *Board of School Dirs. v. Commissioners of Forsyth County*, 127 N.C. 263, 37 S.E. 261 (1900).

Power of Legislature as to Indigents.—

It is the exclusive right of the legislature to determine and declare by whom and how the indigent of the State entitled to support shall be ascertained, and from what fund and by whom allowances for their support shall be made. *Board of Educ. v. Commissioners of Bladen*, 113 N.C. 379, 18 S.E. 661 (1893).

Sec. 2. State and local taxation.

(1) *Power of taxation.* The power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away.

(2) *Classification.* Only the General Assembly shall have the power to classify property for taxation, which power shall be exercised only on a State-wide basis. No class shall be taxed except by a uniform rule, and every classification shall be made by general law uniformly applicable in every county, city and town, and other local taxing unit of the State. The General Assembly's power to classify property shall not be delegated.

(3) *Exemptions.* Property belonging to the State, counties, and municipal corporations shall be exempt from taxation. The General Assembly may exempt cemeteries and property held for educational, scientific, literary, cultural, charitable, or religious purposes, and, to a value not exceeding \$300, any personal property. The General Assembly may exempt from taxation not exceeding \$1,000 in value of property held and used as the place of residence of the owner. Every exemption shall be on a State-wide basis and shall be made by general law uniformly applicable in every county, city and town, and other local taxing unit of the State. No taxing authority other than the General Assembly may grant exemptions, and the General Assembly shall not delegate the powers accorded to it by this subsection.

(4) *Twenty-cent limitation.* The total of the State and county tax on property shall not exceed 20 cents on the \$100 value of property, except when the property tax is levied for a special purpose and with the special approval of the General Assembly, which may be done by special or general act. This limitation shall not apply to taxes levied for the maintenance of the public schools of the State. The State tax shall not exceed five cents on the \$100 value of property.

(5) *Necessary expense limitation.* No tax shall be levied or collected by the officers of any county, city or town, or other unit of local government, except for the necessary expenses thereof, unless approved by a majority of the qualified voters who vote thereon in any election held for the purpose.

(6) *Income tax.* The rate of tax on incomes shall not in any case exceed ten per cent, and there shall be allowed personal exemptions and deductions so that only net incomes are taxed. (1969, c. 872, § 1.)

I. Power of Taxation Generally; Classification.

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I. POWER OF TAXATION GENERALLY; CLASSIFICATION.

A. General Consideration.

Editor's Note.—The provisions of subsections (1), (2) and (6) of this section are similar to those of Art. V, § 3, Const. 1868, as last amended in 1962. The provisions of subsection (3) are similar to those of Art. V, § 5, Const. 1868, as last amended in 1962. The provisions of sub-

section (4) are similar to those of Art. V, § 6, Const. 1868, as last amended in 1952. The provisions of subsection (5) are similar to those of Art. VII, § 6, Const. 1868, as last amended in 1962.

Subsection (6) of this section was rewritten by amendment adopted by vote of the people at the general election held Nov. 3, 1970. The amendment is effective July 1, 1971.

The cases in the following annotation were decided under the corresponding provisions of the Constitution of 1868.

For a brief discussion of subsections (1), (2) and (6) of this section, see 25 N.C.L. Rev. 504. For article on property tax classification and exemption, see 37 N.C.L. Rev. 115 (1959). For comment on the public purpose doctrine, see 3 Wake Forest Intra. L. Rev. 37 (1967).

Opinions of Attorney General. — Mr. Francis M. Coiner, Hendersonville City Attorney, 8/13/69.

The power to levy taxes is the exclusive province of the legislature, and the superior court has no jurisdiction of an action, the nature and purpose of which is to discover, to list and assess for taxation, property which has escaped taxation. *Henderson County v. Smyth*, 216 N.C. 421, 5 S.E.2d 136 (1939).

This section of the Constitution vests exclusive authority in the legislature to levy taxes, which may not be interfered with by the courts. *Person v. Board of State Tax Comm'rs*, 184 N.C. 499, 115 S.E. 336 (1922).

Under this article the power to levy taxes vests exclusively in the legislative branch of the government; and it is within the exclusive power of the General Assembly to provide the method and prescribe the procedure for discovery, listing and assessing property for taxation. *DeLoatch v. Beamon*, 252 N.C. 754, 114 S.E.2d 711 (1960).

Taxes can be levied only for public purposes. *Palmer v. County of Haywood*, 212 N.C. 284, 193 S.E. 668, 113 A.L.R. 1195 (1937); *Ramsey v. Rollins*, 246 N.C. 647, 100 S.E.2d 55 (1957).

There can be no lawful tax which is not levied for a public purpose. *Nash v. Town of Tarboro*, 227 N.C. 283, 42 S.E.2d 209 (1947).

Meaning of "Public Purpose". — A tax or an appropriation is for a public purpose if it is for the support of the government, or for any of the recognized objects of the government. *Green v. Kitchin*, 229 N.C. 450, 50 S.E.2d 545 (1948), discussed in 27 N.C.L. Rev. 500; *Jamison v. City of Charlotte*, 239 N.C. 682, 80 S.E.2d 904

(1954); *Morgan v. Town of Spindale*, 254 N.C. 304, 118 S.E.2d 913 (1961).

Public purpose, when used in connection with the expenditure of municipal funds from the public treasury, refers to such public purpose within the frame of governmental and proprietary power given to the particular municipality, to be exercised for the benefit, welfare and protection of its inhabitants and others coming within the municipal care. It involves reasonable connection with the convenience and necessity of the particular municipality whose aid is extended in its promotion. *Greensboro-High Point Airport Authority v. Johnson*, 226 N.C. 1, 36 S.E.2d 803 (1946); *Nash v. Town of Tarboro*, 227 N.C. 283, 42 S.E.2d 209 (1947).

For comprehensive discussion of "public purpose," see *Mitchell v. North Carolina Indus. Dev. Financing Authority*, 273 N.C. 137, 159 S.E.2d 745 (1968).

As to what are "public purposes," for which a municipality may levy taxes, see 25 N.C.L. Rev. 504.

Tax Revenues May Not Be Used for Private Individuals or Corporations.—The power to appropriate money from the public treasury is no greater than the power to levy the tax which put the money in the treasury. Both powers are subject to the constitutional proscription that tax revenues may not be used for private individuals or corporations, no matter how benevolent. *Mitchell v. North Carolina Indus. Dev. Financing Authority*, 273 N.C. 137, 159 S.E.2d 745 (1968).

But the fact that moneys are paid to an individual does not affect the character of the expenditure, since the object of the expenditure and not to whom paid determines whether it is for a public purpose. *Green v. Kitchin*, 229 N.C. 450, 50 S.E.2d 545 (1948), discussed in 27 N.C.L. Rev. 500.

The Constitution requires that the rule of uniformity be observed. *State ex rel. Dyer v. City of Leaksville*, 275 N.C. 41, 165 S.E.2d 201 (1969).

Compliance with Rule of Uniformity under this Section Satisfies Fourteenth Amendment.—A tax statute which suffices to meet the rule of uniformity required by the Constitution likewise conforms to the requirements of the Fourteenth Amendment of the federal Constitution. *Lenoir Fin. Co. v. Currie*, 254 N.C. 129, 118 S.E.2d 543 (1961).

When Tax Is Uniform. — A tax is uniform when it is equal upon all persons belonging to the described class upon which it is imposed. *Gatlin v. Town of Tarboro*,

78 N.C. 119 (1878); *State v. Danenberg*, 151 N.C. 718, 66 S.E. 301, 26 L.R.A. (n.s.) 890 (1909); *Leonard v. Maxwell*, 216 N.C. 89, 3 S.E.2d 316 (1939).

A tax is uniform and consistent with this section when it is equal on all persons in the same class, and hence a tax imposed on hotelkeepers, which exempts from taxation those whose yearly receipts are less than \$1,000, is not unconstitutional. *Cobb v. Commissioners of Durham County*, 122 N.C. 307, 30 S.E. 338 (1898).

The rule of uniformity is observed if the rate is uniform throughout each taxing authority's jurisdiction. *State ex rel. Dyer v. City of Leaksville*, 275 N.C. 41, 165 S.E.2d 201 (1969).

The rule of uniformity is not violated by double taxation resulting from taxes levied by different authorities if each authority adheres to the uniformity rule in its levies. *State ex rel. Dyer v. City of Leaksville*, 275 N.C. 41, 165 S.E.2d 201 (1969).

When property is within more than one taxing authority, each has the right to make its own levy. *State ex rel. Dyer v. City of Leaksville*, 275 N.C. 41, 165 S.E.2d 201 (1969).

Creation of Tax Districts.—Sometimes it is deemed wise to create a tax district for special purposes, generally for public improvements, such as for highway taxes, bridge taxes, drainage taxes, or the like, and to fix the boundaries of such district as including two or more counties or towns or even making the district wholly independent of such political boundaries. Taxing districts may be as numerous as the purposes for which taxes are levied. Equality and uniformity of taxation does not preclude the power of the State to create separate taxing districts, provided the taxes are equal and uniform within each taxing district. *State ex rel. Dyer v. City of Leaksville*, 275 N.C. 41, 165 S.E.2d 201 (1969).

Wide Latitude Accorded Taxing Authorities.—The power to classify subjects of taxation carries with it the discretion to select them, and a wide latitude is accorded taxing authorities, particularly in respect of occupational taxes, under the power conferred by this section of the Constitution of North Carolina. *Charlotte Coca-Cola Bottling Co. v. Shaw*, 232 N.C. 307, 59 S.E.2d 819 (1950); *Lenoir Fin. Co. v. Currie*, 254 N.C. 129, 118 S.E.2d 543 (1961).

Reasonableness of Classification.—The power of the legislature to classify subjects for the purpose of taxation is flexible,

and the reasonableness of any classification will generally be construed with reference to the facts of the particular case, the predominant limitation on the power to classify being that the classification must be reasonable and not arbitrary and must rest upon some substantial difference between the classes, and that the burden must be equal upon all in the same class, and a special classification by statute of wholesale grocers operating a cold storage chamber of some character for the preservation of fresh meats, as distinguished from those who handled only canned meats not requiring refrigeration, is a reasonable classification imposing an equal burden upon all of the class, and is constitutional and valid. *Southern Grain Provision Co. v. Maxwell*, 199 N.C. 661, 155 S.E. 557 (1930).

The classification must not be arbitrary or unjust, but must be based on substantial and reasonable differences between such classes. *Great Atl. & Pac. Tea Co. v. Doughton*, 196 N.C. 145, 144 S.E. 701 (1928).

The classification of subjects for taxation must be based upon reasonable distinctions and must apply equally to all within each class defined. *Snyder v. Maxwell*, 217 N.C. 617, 9 S.E.2d 19 (1940). This rule applies to municipal corporations taxing trades or professions. *C.D. Kenny Co. v. Town of Brevard*, 217 N.C. 269, 7 S.E.2d 542 (1940).

Property Is Taxable without Regard to Ownership.—In *Latta v. Jenkins*, 200 N.C. 255, 156 S.E. 857 (1931), it is said: By virtue of the provisions of this section, all property, real and personal, in this State, is subject to taxation, in accordance with a uniform rule, under laws which the General Assembly is required by the Constitution to enact, without regard to its ownership, and without regard to the purposes for which specific property is held, unless exempted by or under the provisions of this section. *Salisbury Hosp. v. Rowan County*, 205 N.C. 8, 169 S.E. 805 (1933).

Limitations Irrelevant as to Validity of Local Sales and Use Tax Act.—The constitutional limitations set forth in subsections (1), (2) and (3) of this section relate solely to the taxation of real and personal property, tangible and intangible, according to the value thereof, and are irrelevant in respect of the validity of a local sales and use tax act. *Sykes v. Clayton*, 274 N.C. 398, 163 S.E.2d 775 (1968).

B. Illustrative Cases.

Municipal Airport Is Public Purpose.—The construction and maintenance of a

municipal airport for a city of more than ten thousand inhabitants, engaged in many industries and pursuits, is for a public purpose within the meaning of this section, and no right guaranteed by the Fourteenth Amendment to the federal Constitution will be injuriously affected thereby. *Turner v. City of Reidsville*, 224 N.C. 42, 29 S.E.2d 211 (1944); *City of Reidsville v. Slade*, 224 N.C. 48, 29 S.E.2d 215 (1944).

A tax imposed to raise moneys for Employees' Retirement Fund is for a public purpose and the act provides benefits to thousands of teachers and employees of this State without discrimination, and therefore the tax does not offend this section. *Bridges v. City of Charlotte*, 221 N.C. 472, 20 S.E.2d 825 (1942).

The construction, maintenance and operation of a public hospital by a county is a public purpose for which funds may be provided by taxation under this section. *Trustees of Watts Hosp. v. Board of Comm'rs*, 231 N.C. 604, 58 S.E.2d 696 (1950).

The expenditure of tax funds for the construction of a general county hospital in accordance with G.S. § 131-28.3 is for a public purpose; and a county, when authorized by the General Assembly and with the approval of a majority of the voters, has as much right to issue its bonds to provide hospital facilities for those citizens who are able to pay for the services rendered to them as it does to provide such facilities for the sick and afflicted poor. *Trustees of Rex Hosp. v. Board of Comm'rs*, 239 N.C. 312, 79 S.E.2d 892 (1954).

An expenditure by a municipality for special training of a police officer is for a public purpose. *Green v. Kitchin*, 229 N.C. 450, 50 S.E.2d 545 (1948), discussed in 27 N.C.L. Rev. 500.

The cost of constructing and maintaining a hotel is not a public purpose, within the meaning of this section. *Nash v. Town of Tarboro*, 227 N.C. 283, 42 S.E.2d 209 (1947).

The levying of taxes for public libraries by the State, counties and municipal corporations is for "a public purpose" under this section. *Jamison v. City of Charlotte*, 239 N.C. 682, 80 S.E.2d 904 (1954).

The issuance of revenue bonds by the Industrial Development Financing Authority, pursuant to chapter 123A, in order to acquire sites and to construct and equip buildings and other facilities thereon for lease to private industry, such bonds to be retired by the rental payments, is not a public use or purpose for which State tax

funds may be appropriated to enable the Authority to commence its operations. *Mitchell v. North Carolina Indus. Dev. Financing Authority*, 273 N.C. 137, 159 S.E.2d 745 (1968).

Loans to Students.—Chapter 1177, Session Laws of 1967, which authorizes the State Education Assistance Authority to issue revenue bonds and to use the proceeds therefrom for making loans to "residents of this State to enable them to obtain an education in an eligible institution," does not unconstitutionally authorize use of public funds in violation of this section. *State Educ. Assistance Authority v. Bank of Statesville*, 276 N.C. 576, 174 S.E.2d 551 (1970).

Classification of Mechanical Vending Devices.—While the legislature may not classify mechanical vending machines in accordance with the kinds of merchandise sold by such machines in levying privilege taxes on their use, since the manner in which the article is sold is the same in all instances and the economic advantages in this method of sale may be regarded as the same, it may classify mechanical vending devices for the purpose of taxation and make a further classification or subclassification in accordance with the quantity or kind of commodities sold by such method when such classifications are based upon real and reasonable distinctions. *Snyder v. Maxwell*, 217 N.C. 617, 9 S.E.2d 19 (1940).

Classifying Dealers in Different Kinds of Merchandise.—The requirement of this section that all taxes shall be uniform does not prohibit a municipality, which is empowered to tax persons engaged in mercantile business, from classifying dealers in a particular kind of merchandise, separately from those whose business it is to sell other articles falling within the same generic terms. *Rosenbaum v. City of Newbern*, 118 N.C. 83, 24 S.E. 1 (1896).

Tax Based on Volume of Business.—A tax levied quarterly by a town, under authority of an act of the General Assembly, upon all traders doing business in the town, "of \$1 for every \$1,000 worth of goods sold during the preceding quarter," is uniform and constitutional. *Gatlin v. Town of Tarboro*, 78 N.C. 119 (1878).

Tax Based on Counties in Which a Firm Does Business.—An act taxing every meat packing house doing business in the State \$100 for each county in which such business is carried on is valid. *Lacy v. Armour Packing Co.*, 134 N.C. 567, 47 S.E. 53 (1904).

Basing Taxes on Size of City in Which Business Located.—An act imposing an an-

nual graduated license tax on the business of buying and selling fresh meats from offices, stores, vehicles, etc., in cities of 12,000, 8,000, and under 8,000 inhabitants, respectively, is not unconstitutional, as not being uniform and in not imposing a license if the business is carried on outside a city or town; it being uniform as to all within each class. *State v. Carter*, 129 N.C. 560, 40 S.E. 11 (1901).

Taxing Cotton by Bale.—An act to provide improved marketing facilities for cotton, which enacts that on each bale of cotton ginned in North Carolina for two years, twenty-five cents shall be collected to specially guarantee the State warehouse system against loss, is not in derogation of this section. *Bickett v. State Tax Comm'n*, 177 N.C. 433, 99 S.E. 415 (1919).

Taxes on City Property and on County Property Including Property in City.—The imposition of a tax on county property, including property within a city situated therein, to provide funds for county library purposes, and the imposition of a tax within the city to provide funds for municipal library purposes, does not violate this section, notwithstanding that a greater burden of taxation will be placed on the taxpayers of the municipality, nor does it constitute double taxation, since one tax will be imposed by the city for municipal purposes and the other by the county for county purposes. Further, double taxation is prohibited by neither the State nor federal Constitutions. *Jamison v. City of Charlotte*, 239 N.C. 682, 80 S.E.2d 904 (1954).

Inheritance Tax.—An inheritance tax is in the nature of an excise tax, or one on acquiring property or inheriting from a decedent, and does not come within the prohibition as to taxing an income upon property when the property itself is taxed and its imposition rests with the legislative power. In *re Davis*, 190 N.C. 358, 130 S.E. 22 (1925).

The equality and uniformity required by the State Constitution in property taxation does not apply to inheritance or succession taxation. *Rigby v. Clayton*, 274 N.C. 465, 164 S.E.2d 7 (1968).

Section 105-21 of the General Statutes, which levies an inheritance tax upon the transfer of property within the State at a rate which considers decedent's entire estate wherever situated, even outside the State, is a valid exercise of legislative powers, the statute neither denying equal protection of laws in violation of the Fourteenth Amendment, nor imposing an arbitrary and capricious classification in viola-

tion of this section. *Rigby v. Clayton*, 274 N.C. 465, 164 S.E.2d 7 (1968).

License on Business of Hauling Timber.—An act requiring a license of anyone who carries on the business of hauling timber in a certain county, grading the license with reference to the number of horses driven to the wagon used is not repugnant to this section. *State v. Bullock*, 161 N.C. 223, 75 S.E. 942 (1912).

Requiring Railroads to Pay State Taxes Earlier.—Provisions requiring railroads and other like corporations to pay their State taxes within a shorter period than those to the counties, is a uniform legislative classification applying equally to all within its terms and not objectionable as a discrimination or a denial of the equal protection of the laws prohibited by this section. *Norfolk S.R.R. v. Lacy*, 187 N.C. 615, 122 S.E. 763 (1924).

Taxes Reduced if Assets Returned for Taxes.—An act imposing license taxes on the business of selling automobiles reducing the rate if three fourths of the entire assets of the manufacturer are invested and returned for taxes herein, applies indiscriminately to the manufacturers of every state, and being for the object of reducing the license tax for selling automobiles in this State when the seller is already paying a tax here on three fourths of his assets, is not violative of this section. *Bethlehem Motors Corp. v. Flynt*, 178 N.C. 399, 100 S.E. 693 (1919).

Local Assessment Based on Benefits.—The constitutional provision that taxation shall be equal, uniform, and within certain limits, does not apply to local assessments imposed upon owners of property, who in respect to such ownership are to derive a special benefit in the local improvements for which the tax is expended. *Cain v. Commissioners of Davie County*, 86 N.C. 8 (1882).

While assessments on lands abutting on streets improved are not required to be uniform with all other subjects of taxation, and in view of the particular benefits, such must be uniform as to all property owners within that class to meet the constitutional requirements. *City of Gastonia v. Cloninger*, 187 N.C. 765, 123 S.E. 76 (1924).

Providing for Collection of Taxes for Past Years.—A law to provide for the collection of taxes for past years does not violate the provisions of this section in regard to uniformity of taxation. *North Carolina R.R. v. Commissioners of Alamance*, 82 N.C. 259 (1880).

Special License Tax on Real Estate Brokers Discriminatory. — Chapter 241,

Public-Local Laws 1927, requiring real estate brokers in certain designated counties to be licensed by a real estate commission on the basis of moral character and proficiency in the public interest, and requiring payment of a license fee in addition to the statewide license required, is unconstitutional as it applies only to the real estate brokers in the designated counties and is therefore discriminatory. *State v. Warren*, 211 N.C. 75, 189 S.E. 108 (1937).

Session Laws 1957, c. 1420, creating the North Carolina Fireman's Pension Fund, violated this section for lack of uniformity, in that it exempted members of the Farmers' Mutual Fire Insurance Association from adding the tax imposed by the act to their premiums and collecting it from purchasers of their insurance, as other companies selling similar insurance were required to do by the act. *American Equitable Assurance Co. v. Gold*, 249 N.C. 461, 106 S.E.2d 875 (1959); *In re North Carolina Fire Ins. Rating Bureau*, 249 N.C. 466, 106 S.E.2d 879 (1959).

Tax on Receipt of Proceeds of Life Insurance Policy.—Section 11, c. 127, Public Laws 1937, cannot be construed as imposing an excise tax upon the receipt of proceeds of life insurance policies issued to the beneficiary who retains all rights and liabilities thereunder, in addition to imposing an inheritance tax on the proceeds of policies issued to the insured or in which he retains some incidents of ownership, since such excise tax would have to be computed in accordance with graduated scale on the basis of the amount of insurance together with the value of the estate or the legacy or the distributive share, and thus would produce inequality in the levying of such excise tax in contravention of this section. *Wachovia Bank & Trust Co. v. Maxwell*, 221 N.C. 528, 20 S.E.2d 840 (1942).

A tax on indictments, civil suits, etc., is not a tax within the meaning of this section. *State ex rel. Hewlett v. Nutt*, 79 N.C. 263 (1878).

II. EXEMPTIONS.

Editor's Note.—For article, "The Battle of Exemptions," see 19 N.C.L. Rev. 154. For comment on the public purpose doctrine, see 3 Wake Forest Intra. L. Rev. 37 (1967).

All property is subject to taxation unless exemption is authorized by the Constitution and laws of the State. *Piedmont Mem. Hosp. v. Guilford County*, 221 N.C. 308, 20 S.E.2d 332 (1942).

Legislative Exemptions Must Be Considered with This Section.—The provisions

of the revenue act exempting property from taxation must be considered in connection with this section, since the General Assembly has no power to exempt property from taxation beyond the permissive power granted it by this section. *Sir Walter Lodge, No. 411, I.O.O.F. v. Swain*, 217 N.C. 632, 9 S.E.2d 365 (1940).

And Are to Be Strictly Construed.—Exemptions from taxation are to be strictly construed. *Redevelopment Comm'n v. Guilford County*, 1 N.C. App. 512, 162 S.E.2d 108 (1968).

Statutes enacted by the General Assembly exempting specific property from taxation, because of the purposes for which such property is held and used, are and should be construed strictly, when there is room for construction, against exemption and in favor of taxation. *Salisbury Hosp. v. Rowan County*, 205 N.C. 8, 169 S.E. 805 (1933); *Piedmont Mem. Hosp. v. Guilford County*, 218 N.C. 673, 12 S.E.2d 265 (1940); *Harrison v. Guilford County*, 218 N.C. 718, 12 S.E.2d 269 (1940).

Legislature Must Observe Basic Principle of Equality.—The legislature, in exempting property from taxation, is required to observe the basic principle of equality, and exemptions allowed by it must be uniform within the class as required by this section. *Sir Walter Lodge, No. 411, I.O.O.F. v. Swain*, 217 N.C. 632, 9 S.E.2d 365 (1940).

Section Applies Only to Ad Valorem Taxes.—Any intent or attempt, on the part of the legislature, to grant an exemption from any tax or assessment on real property, pursuant to the provisions of this section, other than for ad valorem taxes, would be without constitutional authorization. *Raleigh Cemetery Ass'n v. City of Raleigh*, 235 N.C. 509, 70 S.E.2d 506 (1952).

This section refers solely and directly to exemptions from ad valorem taxation of property otherwise subject thereto. *Sykes v. Clayton*, 274 N.C. 398, 163 S.E.2d 775 (1968).

The constitutional limitations set forth in this section relate solely to the taxation of real and personal property, tangible and intangible, according to the value thereof, and are irrelevant in respect of the validity of a local sales and use tax act. *Sykes v. Clayton*, 274 N.C. 398, 163 S.E.2d 775 (1968).

And Does Not Grant Exemption from Special or Local Assessments.—Property belonging to municipal corporations is not exempt from assessment for local improvements. *Raleigh Cemetery Ass'n v. City of Raleigh*, 235 N.C. 509, 70 S.E.2d 506 (1952).

The general rule that exemption from taxation does not mean exemption from a special or local assessment, applies with respect to cemetery property. *Raleigh Cemetery Ass'n v. City of Raleigh*, 235 N.C. 509, 70 S.E.2d 506 (1952).

Local assessments against lands along the streets of a city for paving and improving the streets do not fall within the intent and meaning of this section. *Town of Tarboro v. Forbes*, 185 N.C. 59, 116 S.E. 81 (1923).

Assessments on public school property for special benefits thereto, caused by the improvement of the street on which it abuts, are not embraced within the prohibition of this section exempting property belonging to the State or to municipal corporations from taxation. *City of Raleigh v. Raleigh City Administrative Unit*, 223 N.C. 316, 26 S.E.2d 591 (1943); *Raleigh Cemetery Ass'n v. City of Raleigh*, 235 N.C. 509, 70 S.E.2d 506 (1952).

Excise taxes on municipal property are not prohibited. *Stedman v. City of Winston-Salem*, 204 N.C. 203, 167 S.E. 813 (1933).

Provisions Exempting Public Property Are Self-Executing.—The provision of this section that property belonging to or owned by the State or municipal corporations, shall be exempt from taxation, is self-executing and requires no legislation to make it effective. *Salisbury Hosp. v. Rowan County*, 205 N.C. 8, 169 S.E. 805 (1933). See also *Piedmont Mem. Hosp. v. Guilford County*, 218 N.C. 673, 12 S.E.2d 265 (1940); *Raleigh Cemetery Ass'n v. City of Raleigh*, 235 N.C. 509, 70 S.E.2d 506 (1952).

The provision that property belonging to the State or to municipal corporations shall be exempt from taxation is self-executing. *Redevelopment Comm'n v. Guilford County*, 274 N.C. 585, 164 S.E.2d 476 (1968).

When Exemption Attaches.—The quality of exemption attaches to property, as soon as it is lawfully acquired and remains with such property so long as it is owned by the municipal corporation, without regard to the purpose for which it was acquired or was held. *Town of Andrews v. Clay County*, 200 N.C. 280, 156 S.E. 855 (1931).

Corporation, to Be Exempt, Must Be Subordinate Branch of State or Local Government.—In order to come within the constitutional orbit of tax exemption, a corporation must be an instrumentality, an agent, a department, or an arm of the State in the sense of being at least a subordinate branch of the State government or of a local subdivision thereof and

subject to governmental visitation and control, so that ordinarily the interests and franchises pertaining to the corporation are either the exclusive property of the government itself or are under the exclusive control of some agency or political subdivision thereof. *Carolina-Virginia Coastal Highway v. Coastal Tpk. Authority*, 237 N.C. 52, 74 S.E.2d 310 (1953); *Redevelopment Comm'n v. Guilford County*, 1 N.C. App. 512, 162 S.E.2d 108 (1968).

Corporation Composed of Stockholders Is Not a Municipal Corporation.—A municipal corporation is one designed to create within a prescribed territory a local government of the people therein, as a part of that exercised by the State, with certain and defined restrictions and this section, exempting municipal corporations from taxation, does not include within its meaning or intent a corporation composed of shareholders which in its form and controlling features is a business enterprise upon which municipal powers have been incidentally conferred in promotion of its primary purpose. *Southern Ass'y. v. Palmer*, 166 N.C. 75, 82 S.E. 18 (1895).

Drainage Districts Are Not Municipal Corporations.—Drainage districts are not regarded as municipal corporations in purview of this section and a legislative act exempting their bonds from taxation violates the uniform rule as to taxation required by this section. *Drainage Comm'rs v. C.A. Webb & Co.*, 160 N.C. 594, 76 S.E. 552 (1912).

A redevelopment commission is a municipal corporation for the purpose of tax exemption. *Redevelopment Comm'n v. Guilford County*, 274 N.C. 585, 164 S.E.2d 476 (1968).

Even a municipality does not have an absolute exemption. *Redevelopment Comm'n v. Guilford County*, 1 N.C. App. 512, 162 S.E.2d 108 (1968).

This section applies to State or municipal property which is used for a governmental or public purpose. *Redevelopment Comm'n v. Guilford County*, 274 N.C. 585, 164 S.E.2d 476 (1968).

In order for the exemption to apply to property acquired and held by the State or a municipality, the property must be held for public or governmental purposes. *Redevelopment Comm'n v. Guilford County*, 274 N.C. 585, 164 S.E.2d 476 (1968).

"Public Purpose" Defined.—See *Redevelopment Comm'n v. Guilford County*, 274 N.C. 585, 164 S.E.2d 476 (1968).

Interest of State in Business Enterprises Not Included.—The provision contained in this section exempting property

belonging to the State from taxation, does not embrace the interest of the State in business enterprises, such as railroads and the like, but applies to the property of the State held for State purposes. *Atlantic & N.C.R.R. v. Board of Comm'rs*, 75 N.C. 474 (1876). See also *Town of Warrenton v. Warren County*, 215 N.C. 342, 2 S.E.2d 463 (1939).

There are two classes of property of municipal corporations exempt from taxation. First is that class of property held for public use, in that it is used in connection with the operation of the functions of government, such as municipal buildings; second, that class of property held for a public use in that it is for the benefit of the people for their free use and enjoyment, such as parks, playgrounds, athletic fields, art museums, and public uses of a similar nature. When the municipal corporation, however, acquires and holds property without devoting the same to either class of purpose, it is simply held without use. The fact that it is to a certain extent used for the purpose of producing income, when there is no definite plan evolved for its use by or for the public, cannot reasonably be said to constitute holding for a public use. *Redevelopment Comm'n v. Guilford County*, 274 N.C. 585, 164 S.E.2d 476 (1968).

Property of a municipality used for business purposes is not exempt from taxation. *Redevelopment Comm'n v. Guilford County*, 274 N.C. 585, 164 S.E.2d 476 (1968).

But the mere fact that an income is incidentally derived from property does not affect its character as property devoted to public use, where the primary and principal use to which property is put is public. *Redevelopment Comm'n v. Guilford County*, 274 N.C. 585, 164 S.E.2d 476 (1968).

Realty acquired for purposes of a rural housing authority is exempt from taxation under this section. *Mallard v. Eastern Carolina Regional Housing Authority*, 221 N.C. 334, 20 S.E.2d 281 (1942).

Municipal property acquired by tax foreclosure and subsequently rented is liable for county taxes, since it is not used by the city for a governmental purpose, and therefore does not come within the constitutional provision for the exemption of property from taxation. *Town of Benson v. County of Johnston*, 209 N.C. 751, 185 S.E. 6 (1936). See also, in this connection, *Board of Financial Control v. County of Henderson*, 208 N.C. 569, 181 S.E. 636, 101 A.L.R. 783 (1935).

Exemption of Property and Bonds of Municipality.—A legislative provision ex-

empting the property and bonds of a city from taxation is valid when the bonds are to be issued for a public purpose, and certainly the bonds are exempt from taxation if sold to and held by an agency of the United States government, or are held by a purchaser from such federal agency. Any doubt as to the validity of this provision under this section must be resolved in favor of its validity. *Webb v. Port Comm'n*, 205 N.C. 663, 172 S.E. 377 (1934).

The enumerated properties under this section do not expressly include bonds issued by the State or any State agency, whether revenue bonds or full faith and credit bonds. *State Educ. Assistance Authority v. Bank of Statesville*, 276 N.C. 576, 174 S.E.2d 551 (1970).

But Legislature Has Power to Exempt Such Bonds.—It is generally considered that the legislature of a state has the power to exempt state and municipal bonds from taxation, since if such bonds are exempt from taxation the state or municipality will be able to issue them on more favorable terms and may then save more money than it would lose by being deprived of the right to tax them. The legislature may exempt such securities from taxation, although the Constitution enumerates the subjects of exemption, and does not specifically name government securities, and even in the face of a constitutional declaration forbidding passage of laws exempting any property. *State Educ. Assistance Authority v. Bank of Statesville*, 276 N.C. 576, 174 S.E.2d 551 (1970).

Municipal Bonds to Provide Schoolhouses and Equipment Are Exempt.—Bonds issued by a municipality to provide schoolhouses and equipment were for a public purpose, and since the bonds, although the property of a private corporation, were issued for a necessary public purpose and purchased in reliance upon the statutory provision exempting them from taxation, they stand upon the same footing as the school buildings erected with the proceeds of the bonds. *County of Mecklenburg v. Piedmont Fire Ins. Co.*, 210 N.C. 171, 185 S.E. 654 (1936).

Statute Exempting Student Loan Revenue Bonds.—The provisions of chapter 1177, Session Laws of 1967, that exempt student loan revenue bonds from taxation by the State or by any of its subdivisions do not contravene this section. *State Educ. Assistance Authority v. Bank of Statesville*, 276 N.C. 576, 174 S.E.2d 551 (1970).

Taxing Shares of Stock in National Bank.—Shares of stock in a national bank are proper subjects of State, county and municipal taxation. Such shares owned by

nonresidents are to be taxed in the city or town where the bank is located and not elsewhere. *Kyle v. Mayor & Comm'rs*, 75 N.C. 445 (1876).

Provision as to Exemption of Property Used for Educational, etc., Purposes Is Not Self-Executing.—The provision of this section that the General Assembly may exempt from taxation property held for educational, scientific, literary, charitable or religious purposes, is a grant of power and is not self-executing, and the power of the legislature to prescribe such exemptions is limited by the terms of the grant. *Piedmont Mem. Hosp. v. Guilford County*, 218 N.C. 673, 12 S.E.2d 265 (1940).

Under subsection (3) of this section the legislature may exercise, to the full extent or in part, the power to exempt from taxation property held for educational, scientific, literary, charitable or religious purposes, or may decline to exempt at all. The constitutional provision being in the disjunctive, the legislature can exempt the property up to a certain value and tax all above it, and may also tax property held for one of the purposes named and exempt that held for others. *Congregation of United Brethren v. Commissioners of Forsyth County*, 115 N.C. 489, 20 S.E. 626 (1894). See also *Salisbury Hosp. v. Rowan County*, 205 N.C. 8, 169 S.E. 805 (1933).

Nor Is Provision as to Property Used as Residence.—The third sentence of subsection (3) is only permissive in terms and not self-executing. The power of exemption, to the extent therein mentioned, is exercisable, in whole or in part, or not at all, as the General Assembly, in its wisdom, shall determine. *Nash v. Board of Comm'rs*, 211 N.C. 301, 190 S.E. 475 (1937).

And Power of Legislature to Grant Such Exemptions Is Limited. — The power of the legislature to exempt from taxation property not owned by the State or its political subdivisions is perforce limited and restricted by the scope of the constitutional grant of the permissive power of exemption. *County of Rockingham v. Board of Trustees*, 219 N.C. 342, 13 S.E.2d 618 (1941). See also *Trustees of Guilford College v. Guilford County*, 219 N.C. 347, 13 S.E.2d 622 (1941).

The power to grant exemptions under authority of the second sentence in subsection (3) of this section, which may be exercised in whole, or in part, or not at all, as the General Assembly shall elect, is limited to property held for one or more of the purposes therein designated. *County of Rockingham v. Board of Trustees*, 219 N.C. 342, 13 S.E.2d 618 (1941). See also

Trustees of Guilford College v. Guilford County, 219 N.C. 347, 13 S.E.2d 622 (1941).

Use to Which Property Is Devoted Controls.—Under this section it is the use to which the property is devoted and to the extent of the interest so dedicated which should control, rather than the title or other tenure by which it is held, and its provisions are broad and comprehensive enough to uphold the legislative exemption as to all property used exclusively for educational purposes. *State ex rel. Corp. Comm'n v. Oxford Sem. Constr. Co.*, 160 N.C. 582, 76 S.E. 640 (1912).

The power granted the legislature to exempt property from taxation is limited by the language of this section to property held for educational, scientific, charitable or religious purposes, the purpose for which the property is held and not the character of the corporation or association holding the property being the basis for the grant of permissive power to exempt, and the legislature has no power to exempt property held by a religious or charitable corporation or organization for business or commercial purposes. *Sir Walter Lodge, No. 411, I.O.O.F. v. Swain*, 217 N.C. 632, 9 S.E.2d 365 (1940).

A lot purchased by trustee of a church for the purpose of erecting a new church and Sunday school thereon adequate for the needs of the congregation, and, pending the accumulation of sufficient funds to build the new church, used exclusively for open air Sunday school and church meetings, is property held for religious purposes within the meaning of this section and the legislature has power to exempt such property from taxation. *Harrison v. Guilford County*, 218 N.C. 718, 12 S.E.2d 269 (1940).

Business Property Owned by Exempted Institution Not Exempt.—Business property owned by an educational institution and rented for offices and business purposes to private enterprises, the net profit derived therefrom being devoted exclusively to educational purposes, was not within the exemption granted by this section. *County of Rockingham v. Board of Trustees*, 219 N.C. 342, 13 S.E.2d 618 (1941). See also *Trustees of Guilford College v. Guilford County*, 219 N.C. 347, 13 S.E.2d 622 (1941).

Property owned by a church and rented by it for commercial purposes, and the rent used for religious purposes, is not exempt from taxation. *Sparrow v. Beaufort County*, 221 N.C. 222, 19 S.E.2d 861 (1942).

Property in Hands of Trustee.—Where in construing a devise of various property

in a city the courts have decreed that the lands be sold within a period of five years and fifty-five percent of the proceeds distributed among several beneficiaries of the class exempted by this section, the property itself is not held by the beneficiaries designated, but by the trustee in trust for the purpose of sale and distribution of part of the proceeds of the sale to them, and the exemption does not apply except to the proceeds of the sale when received by the beneficiaries in accordance with the decree, and the lands in the hands of the trustee are subject to taxation under this section. *Latta v. Jenkins*, 200 N.C. 255, 156 S.E. 857 (1931).

No Distinction Between Public and Private Institutions.—The provisions of this section make no distinction between public and private educational corporations, or between institutions which are in part conducted for the personal profit of the owner and those which are run on a salary basis, using any profits which may arise in the extension of the work. *State ex rel. Corp. Comm'n v. Oxford Sem. Constr. Co.*, 160 N.C. 582, 76 S.E. 640 (1912).

Weight of Fact That Institution Has Not Been Paying.—The fact that an educational incorporation had gone for a long period of time without paying taxes unchallenged by both the legislative and executive department of the government is deserving of great weight by the court in construing this section. *State ex rel. Corp. Comm'n v. Oxford Sem. Constr. Co.*, 160 N.C. 582, 76 S.E. 640 (1912).

Exemption of Farm Products.—The exception of "farm products purchased from the producer" from the return required to be made by merchants and other dealers as the basis for a license tax is not a discrimination against the products or citizens of other states; nor is it in violation of the provisions of this section which requires uniformity of taxation. *State v. Stevenson*, 109 N.C. 730, 14 S.E. 385 (1891); *Ex parte Brown*, 48 F. 435 (E.D.N.C. 1891).

III. TWENTY-CENT LIMITATION.

Editor's Note.—For article on property and poll tax limitations under subsection (4) of this section and § 1 of this article, see 18 N.C.L. Rev. 275.

Special Approval for Necessary Expenditures.—This section of the State Constitution authorizes the legislature to give special approval of taxation by a county for necessary expenditures by either a special or general statute. *Norfolk S.R.R. v. Reid*, 187 N.C. 320, 121 S.E. 534 (1924).

As to necessary expenses, see post, this note, analysis line IV.

May Be Given by General or Special Act.—The legislative authority necessary to the validity of an assessment of taxes by a county for a special purpose in excess of the constitutional limit for general county purposes may be conferred by special or general act. *Atlantic Coast Line R.R. v. Lenoir County*, 200 N.C. 494, 157 S.E. 610 (1931).

Details Unnecessary.—An act giving the special approval of the legislature to county taxation for special purposes need not specify the sum to be raised by such taxation, nor a limit beyond which it cannot be carried; details are not proper in such statutes—these should be left to the commissioners. *Brodnax v. Groom*, 64 N.C. 244 (1870).

Supremacy of Legislative Power.—The constitutional power conferred on the legislature to authorize counties to levy a special tax upon the property and poll for special county purposes is essential to the existence of the State, and in the exercise of this power the legislature is supreme. *Moose v. Board of Comm'rs*, 172 N.C. 419, 90 S.E. 441 (1916).

When Vote and Legislative Authority Necessary.—Cities and towns may levy a tax for necessary expenses up to the constitutional limitation without a vote of the people and without legislative permission; for necessary expenses they may exceed the constitutional limitation by legislative authority, without the approval of the voters; but for purposes other than necessary, a tax cannot be levied either within or in excess of the constitutional limitation except with the approval of the voters under special legislative authority. *Henderson v. City of Wilmington*, 191 N.C. 269, 132 S.E. 25 (1926).

Levy Beyond Limitation Void.—A levy beyond the limitation is void. *State ex rel. County Bd. of Educ. v. Commissioners of Currituck County*, 107 N.C. 110, 12 S.E. 190 (1890).

What is a "special purpose" within the meaning of subsection (4) of this section is a matter for judicial rather than legislative determination, since such purpose for which an unlimited tax may be levied with the special approval of the General Assembly must also be a "necessary expense" of the county within the meaning of subsection (5) of this section, which involves both questions of law and fact. *Nantahala Power & Light Co. v. County of Clay*, 213 N.C. 698, 197 S.E. 603 (1938).

The last paragraph of G.S. § 153-152, au-

thorizing a county to levy a tax to pay a public hospital for the care and hospitalization of the indigent sick of the county under a contract with a hospital, does not violate subsection (4) of this section, since the tax contemplated is for a special, necessary purpose, with special approval of the General Assembly. *Martin v. Board of Comm'rs*, 208 N.C. 354, 180 S.E. 777 (1935).

Levy Partly for Special and Partly for General Purposes. — Where a statute authorizing the levy of a tax beyond the constitutional limit for a special purpose is *infra vires*, the taxes collected beyond the requirements of the special purposes may be turned into the general fund and used for general purposes, but where the act authorizes the levy partly for a "special purpose" and partly for general purposes, it is *ultra vires* and no part of the levy can be collected. *Williams v. Commissioners of Craven County*, 119 N.C. 520, 26 S.E. 150 (1896).

Where Act Severable, Valid Part Effective. — An act that attempts to authorize a county to supplement to any extent its fund for general county expenses by special tax beyond the limitations set by subsection (4) of this section, is to that extent unconstitutional and void; but where the valid portion of the act is distinctly severable from the invalid part, and may alone be enforced by the methods prescribed, without being affected by the invalid part, the entire statute will not be declared invalid by the courts. *Norfolk S.R.R. v. Reid*, 187 N.C. 320, 121 S.E. 534 (1924).

County Tax for Necessary Expenses. — Within the limitations of subsection (4) of this section the county commissioners of the respective counties may levy a tax for necessary expenses without a vote of the people or special legislative authority. *Glenn v. Board of County Comm'rs*, 201 N.C. 233, 159 S.E. 439 (1931); *Sessions v. Columbus County*, 214 N.C. 634, 200 S.E. 418 (1939).

And a county may levy taxes for necessary expenses in excess of the limitation fixed in subsection (4) of this section, without a vote, when the levy is also for a special purpose with the special approval of the legislature. *Sessions v. Columbus County*, 214 N.C. 634, 200 S.E. 418 (1939).

The limitation of § 3 of this article, on the contraction of debts by counties and municipalities is in addition to the limitations prescribed by subsections (4) and (5) of this section, and such local units may not create debts and issue bonds without a vote of the people, even for necessary expenses within the limitation prescribed by subsection (4) without the approval of the

legislature, or in excess of the limitation prescribed by subsection (4) with the special approval of the legislature, unless such bonds, together with such other bonds as may have been issued during the fiscal year, do not exceed two thirds of the amount by which such unit decreased its outstanding indebtedness during the prior fiscal year. *Hallyburton v. Board of Educ.*, 213 N.C. 9, 195 S.E. 21 (1938).

While ordinarily when a statute is constitutional in part and unconstitutional in part, only the unconstitutional provisions will be disregarded, when an item for the levy of taxes includes both general and special expenses, the entire item in excess of the constitutional limitation must fail, or if an item combines both a special and an unnecessary expense, the item must fail in its entirety. *Nantahala Power & Light Co. v. County of Clay*, 213 N.C. 698, 197 S.E. 603 (1938).

Tax for "Incidental Purposes." — Defendant county levied taxes up to the constitutional limitation for general county purposes, and in addition thereto levied a tax for "upkeep of county buildings, courthouse, county home, poor and paupers, and incidental purposes." It was held that the court may not determine whether the "incidental expenses" are for a necessary or unnecessary purpose, or for a general or special purpose, or how much of the tax is for "incidental expenses," and therefore the entire item is void as not being for a special purpose with special approval of the legislature within the meaning of subsection (4) of this section. *Nantahala Power & Light Co. v. County of Clay*, 213 N.C. 698, 197 S.E. 603 (1938).

Attorney's Fees. — Defendant county levied taxes up to the constitutional limitation for general county purposes and in addition thereto levied taxes for the purposes of "commissioners' pay, expense and board, courthouse and grounds, and county attorney's fees." It was held that no special approval of the legislature being shown for county attorney's fees, the entire item must fail, and furthermore, the other purposes included in the item are for general county expenses and not for a special purpose within the meaning of this section. *Nantahala Power & Light Co. v. County of Clay*, 213 N.C. 698, 197 S.E. 603 (1938).

A tax to pay the county farm agent's salary is for a special purpose having the special approval of the legislature, within the meaning of subsection (4) of this section, for which a tax in excess of the limitation may be imposed. *Nantahala Power & Light Co. v. County of Clay*, 213 N.C. 698, 197 S.E. 603 (1938).

Regularly Recurring Expenditures in Performance of Governmental Duty. — A purpose which involves a regularly recurring expenditure in the performance of a duty or the exercise of a power which is essential to government and which has been delegated to the county unit of government, is a general rather than a special purpose within the meaning of this provision. *Southern Ry. v. Mecklenburg County*, 231 N.C. 148, 56 S.E.2d 438 (1949).

Tax for Road Purposes. — Authority may be given by the legislature to a county to levy a special tax for road purposes upon the approval of its electors lawfully ascertained, to exceed the general tax limitation, by special or general acts. *State v. Kelly*, 186 N.C. 365, 119 S.E. 755 (1923).

An act authorizing counties to issue bonds for the purpose of laying out and operating, altering and improving the public roads of the county, etc., is for a special purpose within the intent and meaning of subsection (4) of this section. *Parvin v. Board of Comm'rs*, 177 N.C. 508, 99 S.E. 432 (1919).

Giving County Commissioners Authority to Issue Bonds. — The authority conferred upon the board of county commissioners to build its roads and bridges in any way that may seem practicable, and issue bonds not to exceed the actual cost, and to levy sufficient tax on real and personal property to pay interest, and create a sinking fund, is not necessarily inconsistent with subsection (4) of this section excepting from the limitation of fifteen (now twenty) cents on the one hundred dollar valuation of property a levy on county property for "a special purpose, and with the approval of the General Assembly, which may be done by special or general act." *Norfolk S.R.R. v. McArtan*, 185 N.C. 201, 116 S.E. 731 (1923).

Ordinarily Expenses of Holding Courts and Maintaining Jails Are General Expenses. — Only under exceptional circumstances may the expenses of holding courts and maintaining the county jail and caring for jail prisoners be classified as expenses for special purposes, since ordinarily the holding of courts is a general expense recurring in the ordinary course of and as necessary steps in the operation of the county government, and the maintenance of the county jail and the caring for prisoners is a general expense, continuous and ever present, and a tax levy therefor in addition to the levy made for general county purposes in another item is invalid, and plaintiff is entitled to recover the amount paid under the additional levy in

his suit therefor instituted in accordance with the statutory procedure. *Southern Ry. v. Cherokee County*, 218 N.C. 169, 10 S.E.2d 607 (1940); *Atlantic Coast Line R.R. v. Duplin County*, 226 N.C. 719, 40 S.E.2d 371 (1946).

A tax levied by the county commissioners for the aged and infirm, to pay jurors, for feeding and caring for the county prisoners are expenses to be paid from the general county fund as current expenses, and fall within the limitations of subsection (4) of this section. *Southern Ry. v. Cherokee County*, 195 N.C. 756, 143 S.E. 467 (1928).

Cumberland County was authorized by the Act of 1923 to levy annually five cents only on the one hundred dollar valuation, for maintaining county homes for the aged and infirm and for similar purposes. *Atlantic Coast Line R.R. v. Cumberland County*, 223 N.C. 750, 28 S.E.2d 238 (1943).

Upkeep of county buildings and upkeep and maintenance of county home for the aged and infirm are general expenses and must be covered in the fifteen-cent (now twenty-cent) levy limited for general purposes. *Atlantic Coast Line R.R. v. Duplin County*, 226 N.C. 719, 40 S.E.2d 371 (1946).

Levy for Public Welfare.—The board of county commissioners of Beaufort County having levied, in the year 1942, a tax rate of fifteen cents on the one hundred dollars property valuation for general purposes, the limit then fixed by this section, the levy for public welfare or poor relief was limited to a rate of five cents on the one hundred dollars property valuation, and any levy for public welfare or poor relief, in excess thereof, was held invalid. *Atlantic Coast Line R.R. v. Beaufort County*, 224 N.C. 115, 29 S.E.2d 201 (1944).

Correction of Minutes of Levy. — The board of commissioners of a county may correct the minutes of a levy of taxes formerly made by it to show separately the items relating to current county expenses and the items of levy for unauthorized special purposes when no change in the former levies are thereby made. *Southern Ry. v. Cherokee County*, 195 N.C. 756, 143 S.E. 467 (1928).

Public-Local Laws 1927, c. 201, applicable to Cherokee County, cannot validate a void levy. *Southern Ry. v. Cherokee County*, 194 N.C. 781, 140 S.E. 748 (1927). It may be that the General Assembly could pass a special act or general law allowing a levy for special purposes of this kind in emergency cases. *Southern Ry. v. Cherokee County*, 195 N.C. 756, 143 S.E. 467 (1928).

Expenditure for maintenance of a rural police force is for a continuing expense in

furtherance of an indispensable function of county government, and therefore is for a general county purpose within the meaning of the constitutional limitation on the tax rate for such purposes. *Southern Ry. v. Mecklenburg County*, 231 N.C. 148, 56 S.E.2d 438 (1949).

Bonds Issued to Refund Other Bonds.—

Where the municipal finance act does not apply to refunding certain bonds of a county, issued prior to its operating effect, and the bonds become due and payable, and there is no provision made for their payment, the act of the board of county commissioners in paying them out of the general county fund as a temporary arrangement, using the bonds as collateral to secure the repayment by refunding bonds to be authorized by the legislature, it was held that the bonds later authorized by the legislature and issued by the county to refund the indebtedness to the general county fund are for a special purpose and do not fall within the general limitation of fifteen (now twenty) cents on the one hundred dollars valuation prescribed by the Constitution. *Barbour v. County of Wake*, 197 N.C. 314, 148 S.E. 470 (1929).

Under c. 342, Public-Local Laws 1935, defendant county proposed to issue county bonds to refinance bonds issued by the townships of the county. The proceeds of the township bonds were used in the construction of highways which were later taken over by the county and thereafter by the State. The proposed county bond issue is for a county purpose within the meaning of this section. *Thomson v. Harnett County*, 209 N.C. 662, 184 S.E. 490 (1936).

A county has authority to issue funding and refunding bonds with the approval of the local government commission to take up valid, outstanding indebtednesses of the county which were incurred for necessary county expenses. *Brooks v. Avery County*, 206 N.C. 840, 175 S.E. 199 (1934). See *Thomson v. Harnett County*, 209 N.C. 662, 184 S.E. 490 (1936).

Bonds for Erection of Jail.—Where the erection of a new jail was a public necessity, bonds necessary to provide funds for the erection and the taxes necessary to pay principal and interest of such bond issue are not subject to limitation on the tax rate. *Castevens v. Stanly County*, 209 N.C. 75, 183 S.E. 3 (1935).

IV. NECESSARY EXPENSE LIMITATION.

A. General Consideration.

Cross Reference.—As to special local tax elections for school purposes, see G.S. § 115-116 et seq. and note thereto.

Editor's Note.—For article on "Necessary Expenses," see 18 N.C.L. Rev. 93. For note on "necessary expenses" of municipal corporations under this section, see 30 N.C.L. Rev. 313 (1952). For note entitled "'Necessary Expense' Limitation—Four Recent Developments," see 43 N.C.L. Rev. 372 (1965).

In General.—For purposes other than necessary expenses, whether special or not, taxes may not be levied by a county either within or in excess of the limitation fixed by subsection (4) of this section except by a vote of the people under special legislative authority. *Glenn v. Board of County Comm'rs*, 201 N.C. 233, 159 S.E. 439 (1931); *Sessions v. Columbus County*, 214 N.C. 634, 200 S.E. 418 (1939); *Wilson v. City of High Point*, 238 N.C. 14, 76 S.E.2d 546 (1953).

Intent of Subsection (5).—Subsection (5) of this section was intended to present another check to the imprudence of county and municipal officers. *Paine v. Caldwell*, 65 N.C. 488 (1871).

Subsection (5) of this section is an absolute prohibition. It is cumulative and adds another restraint to subsection (4). *Brodnax v. Groom*, 64 N.C. 244 (1870).

Rule and Exception Thereto.—Under subsection (5) of this section approval of taxation by popular vote is the rule, and the power to impose a tax for a necessary expense without a vote is the exception. *Purser v. Ledbetter*, 227 N.C. 1, 40 S.E.2d 702 (1946).

Rigid Observance.—The necessity of a rigid observance of this section has been emphasized by G.S. § 160-62. *Horton v. Redevelopment Comm'n*, 259 N.C. 605, 131 S.E.2d 464 (1963).

The only way to preserve the vitality of subsections (4) and (5) of this section is to adhere to the construction, that the "special purpose" for which the "special approval" of the General Assembly is essential under subsection (4) must be for a "necessary expense" in contemplation of subsection (5). *Castevens v. Stanly County*, 209 N.C. 75, 183 S.E. 3 (1935), citing *Glenn v. Board of County Comm'rs*, 201 N.C. 233, 159 S.E. 439 (1931).

The limitations imposed by this section are applicable solely to municipalities and not to agencies of the State. *Harris v. Board of Comm'rs*, 1 N.C. App. 258, 161 S.E.2d 213 (1968).

The term "municipal corporation" should not be construed narrowly to include only cities, towns, counties and school districts, as the Constitution contemplates a broader construction of the term, and in its broader sense the term includes all public corporations exercising

governmental functions within the constitutional limitations. *Wells v. Housing Authority*, 213 N.C. 744, 197 S.E. 693 (1938); *Carolina-Virginia Coastal Highway v. Coastal Tpk. Authority*, 237 N.C. 52, 74 S.E.2d 310 (1953).

School Districts as Municipal Corporations.—School districts are public quasi-corporations, included in the term municipal corporations as used in subsection (5) of this section. *Smith v. School Trustees*, 141 N.C. 143, 53 S.E. 524 (1906).

A legally qualified board of trustees of the graded schools of a town is a municipal corporation within the meaning and purport of subsection (5) of this section. *Hollowell v. Borden*, 148 N.C. 255, 61 S.E. 638 (1908).

The State is not a municipality within the meaning of the Constitution. It may perform the duties required of it by the Constitution, as well as exercise those powers not otherwise prohibited, without embarrassment by constitutional limitations expressly operating on municipalities alone. *Harris v. Board of Comm'rs*, 1 N.C. App. 258, 161 S.E.2d 213 (1968).

The State is not a municipality within the meaning of the Constitution, and since a city or county, in the operation of public schools within its territory, is not a municipality but an administrative agency of the State, such administrative units, in imposing taxes necessary to the maintenance of public schools, is not required to submit the question to a vote, the limitations imposed by subsection (5) of this section being applicable solely to municipalities. *Bridges v. City of Charlotte*, 221 N.C. 472, 20 S.E.2d 825 (1942).

Although an administrative unit of the State public school system is required by the statute to submit to its voters the question of supplementing State funds to conduct schools of higher standards and longer terms, the provision for a vote is not in deference to subsection (5) of this section and the establishment of such supplement in no wise affects the character of the unit as a State agency for the administration of the public school system. *Bridges v. City of Charlotte*, 221 N.C. 472, 20 S.E.2d 825 (1942).

Subsection (5) of this section applies to local matters relating to the affairs of the county separately considered, and not to a statewide system of education, in which the counties are acting as governmental agencies for the carrying out of the entire scheme, made mandatory by the Constitution, requiring the maintenance of public schools. *Owens v. Wake County*, 195 N.C. 132, 141 S.E. 546 (1928).

And Does Not Extend to Statewide Measures.—The restrictions contained in subsection (5) of this section must be understood to refer to taxes in furtherance of local measures and do not extend to a statewide measure undertaken in obedience to a separate provision of the Constitution, and in which the counties are expressly recognized as the governmental units through which the general purpose may be made effective. *Lacy v. Fidelity Bank*, 183 N.C. 373, 111 S.E. 612 (1922).

It Refers to County, City or Town as State Governmental Agency.—Subsection (5) of this section refers to the county, city, or town as a State governmental agency, and does not authorize an appropriation of a certain percent of taxes levied upon their taxpayers for the use or disposition of a chamber of commerce of a city, without the approval of the qualified voters therein. *Ketchie v. Hedrick*, 186 N.C. 392, 119 S.E. 767 (1923).

Function Must Be Public.—A municipal corporation cannot, even with express legislative sanction, embark on any private enterprise or assume any function which is not in a legal sense public. *Brown v. Board of Comm'rs*, 223 N.C. 744, 28 S.E.2d 104 (1943).

A municipal corporation cannot, even with express legislative sanction, engage in any private enterprise or assume any function which is not in a legal sense public in nature, the word "private" as used in opinions discussing the powers of a municipality being used to designate proprietary, as distinguished from governmental, functions. *Keeter v. Town of Lake Lure*, 264 N.C. 252, 141 S.E.2d 634 (1965).

Local Assessments Not Taxation Requiring Vote.—Laying an assessment for building a stock-law fence in territory where the law is effective is not taxation requiring its submission to a vote of the people of the district. *Shuford v. Commissioners of Lincoln County*, 86 N.C. 552 (1882); *Tripp v. Commissioners of Pitt County*, 158 N.C. 180, 73 S.E. 896 (1912).

No vote of the people is required on the proposition of apportioning the burden of draining lands by local assessments. *Sanderlin v. Luken*, 152 N.C. 738, 68 S.E. 225 (1910).

When Indebtedness Already Voted on.—That part of subsection (5) of this section forbidding the levy of any taxes by a municipal corporation except for necessary expenses, unless by a vote of the people, applies only to such indebtedness as has not been submitted to a vote of the people. *City of Charlotte v. E.D. Shepard & Co.*, 122 N.C. 602, 29 S.E. 842 (1898).

Authority to Issue Bonds Implies Authority to Levy Taxes for Payment of Bonds.—The exercise by a municipal corporation of the power to pledge its credit is an incipient step in the exercise of the power of taxation, and authority given to a municipality to issue bonds necessarily involves the power to levy taxes for the payment of interest on said bonds and the payment of said bonds at maturity. *Wilson v. City of High Point*, 238 N.C. 14, 76 S.E.2d 546 (1953).

Where Election Held Although Not Necessary to Validity of Bonds.—Where a vote of the people is not necessary to the validity of the bonds proposed to be issued, if an election should be called and the tax approved by the electors of the town, such tax would be valid regardless of whether it was levied for a necessary expense. *Webb v. Port Comm'n*, 205 N.C. 663, 172 S.E. 377 (1934).

When Funds Are Already on Hand.—Subsection (5) of this section has no application where the funds to be applied are already on hand and the proposed expenditure will impose no further liability on the municipality, nor involve the imposition of further taxation upon it. *Adams v. City of Durham*, 189 N.C. 232, 126 S.E. 611 (1925).

The acquisition of the land for a municipal airport from surplus funds was not beyond the power of the city and it in no way offended the provisions of subsection (5) of this section. *Goswick v. City of Durham*, 211 N.C. 687, 191 S.E. 728 (1937).

Where appropriations were made by two cities and a county to airport authority out of funds not derived from ad valorem taxes and funds were free from other specified purpose or legal commitment, no question of credit or taxation in violation of subsection (5) of this section is involved. *Greensboro-High Point Airport Authority v. Johnson*, 226 N.C. 1, 36 S.E.2d 803 (1946), distinguishing *Sing v. City of Charlotte*, 213 N.C. 60, 195 S.E. 271 (1938).

Levy of Tax for Contingent Fund and Appropriation Therefrom.—Since a municipality may not levy a tax directly for the purpose of operating, maintaining and improving an airport without a vote of the people, it may not levy a tax for a contingent fund and thereafter in the same year appropriate money from the contingent fund thus created for the purpose of operating, maintaining, and improving the airport, since it may not do indirectly what it is without power to do directly. *Sing v. City of Charlotte*, 213 N.C. 60, 195 S.E. 271 (1938).

Statutory Provisions for Election Held Void.—A legislative act which authorizes an

election to be held upon the question of levying a special school tax providing that if any township should cast a majority of its votes in its favor it should apply only to the township, should the county as a whole reject the proposition, and requiring but a single ballot upon two propositions, is contrary to subsection (5) of this section and void. *Hill v. Lenoir County*, 176 N.C. 572, 97 S.E. 498 (1918).

Section 115-80 (a) of the General Statutes is a valid exercise of legislative authority, and a challenge to its validity on the asserted ground it is violative of subsection (5) of this section is without merit. *Harris v. Board of Comm'rs*, 274 N.C. 343, 163 S.E.2d 387 (1968).

The last paragraph of § 115-80 (a) is authorized by N.C. Const., Art. IX, § 2, and does not violate the provisions of subsection (5) of this section. *Harris v. Board of Comm'rs*, 1 N.C. App. 258, 161 S.E.2d 213 (1968).

As to estoppel of taxpayers to deny the invalidity of a special school tax, see *Carr v. Little*, 188 N.C. 100, 123 S.E. 625 (1924).

B. What Are "Necessary Expenses."

"Necessary Expenses" Defined.—The term, "necessary expenses" is not confined to expenses incurred for purposes absolutely necessary to the very life and existence of a municipality, but it has a more comprehensive meaning. *Storm v. Town of Wrightsville Beach*, 189 N.C. 679, 128 S.E. 17 (1925).

The term "necessary expense" more especially refers "to the ordinary and usual expenditures reasonably required to enable a county to properly perform its duties as part of the State government." *Horton v. Redevelopment Comm'n*, 259 N.C. 605, 131 S.E.2d 464 (1963); *Cole v. City of Asheville*, 2 N.C. App. 652, 163 S.E.2d 628 (1968).

The test of a "necessary expense" is the purpose for which the expense is to be incurred—if the purpose is the maintenance of the public peace or the administration of justice; if it partakes of a governmental nature or purports to be an exercise by the city of a portion of the State's delegated sovereignty; if in brief, it involves a necessary governmental expense. *Cole v. City of Asheville*, 2 N.C. App. 652, 163 S.E.2d 628 (1968).

Where the purpose for which a proposed expense is to be incurred by a municipality is the maintenance of public peace or administration of justice, or partakes of a governmental nature, or purports to be an exercise by the municipality of a portion of the State's delegated sovereignty, the expense is a necessary expense with-

in subsection (5) of this section, and may be incurred without a vote of the people. *Green v. Kitchin*, 229 N.C. 450, 50 S.E.2d 545 (1948), discussed in 27 N.C.L. Rev. 500; *Wilson v. City of High Point*, 238 N.C. 14, 76 S.E.2d 546 (1953); *Horton v. Redevelopment Comm'n*, 259 N.C. 605, 131 S.E.2d 464 (1963).

Where the expense is for the administration of justice, maintenance of the public peace, or partakes of a governmental nature, or if it is an exercise by the municipality of a portion of the State's delegated sovereignty, then the expense is a necessary expense under subsection (5) of this section, and there need not be a vote of the people. *Cole v. City of Asheville*, 2 N.C. App. 652, 163 S.E.2d 628 (1968).

The cases declaring certain expenses to be necessary refer to some phase of municipal government. *Cole v. City of Asheville*, 2 N.C. App. 652, 163 S.E.2d 628 (1968).

What Is Necessary Expense Is Question for Court.—It has become the accepted meaning of subsection (5) of this section that it is the province of the courts to decide whether a particular municipal expense falls within the category of necessary expenses, leaving to the municipal authorities the power to determine whether a proposed expense within that category is necessary in a given case. *Starmount Co. v. Ohio Sav. Bank & Trust Co.*, 55 F.2d 649 (4th Cir. 1932).

What are necessary expenses for a municipal corporation for which it may contract a debt, pledge its faith, or loan its credit and levy a tax without an approving vote of a majority of those who shall vote thereon in an election held for such purpose, is a question for the court. *Horton v. Redevelopment Comm'n*, 259 N.C. 605, 131 S.E.2d 464 (1963).

What is a necessary expense within the meaning of subsection (5) of this section is for the determination of the Supreme Court, not the General Assembly. *DeLoatch v. Beamon*, 252 N.C. 754, 114 S.E.2d 711 (1960); *Dennis v. City of Raleigh*, 253 N.C. 400, 116 S.E.2d 923 (1960).

It is not for the court to determine the wisdom of a decision to contract a debt for a county or a city, but it is the duty of the court to determine whether the proposed indebtedness is for a "necessary expense" within the meaning of subsection (5) of this section. *Vance County v. Royster*, 271 N.C. 53, 155 S.E.2d 790 (1967); *Cole v. City of Asheville*, 2 N.C. App. 652, 163 S.E.2d 628 (1968).

The courts determine whether a given project is a necessary expense of a municipality, but the governing authorities of the

municipality determine in their discretion whether such given project is necessary or needed in the designated locality. *Starmount Co. v. Town of Hamilton Lakes*, 205 N.C. 514, 171 S.E. 909 (1933); *Nantahala Power & Light Co. v. County of Clay*, 213 N.C. 698, 197 S.E. 603 (1938).

And Legislative Declaration and Municipal Commissioners' Finding are Not Controlling.—The declaration of the General Assembly in a statute authorizing a municipality to levy a tax and the finding of the municipal commissioners that the tax is for a necessary municipal expense within the meaning of subsection (5) of this section, is not controlling, but, when made in good faith, such declaration and finding are persuasive, and are entitled to serious consideration by the courts in determining whether the purpose for which the tax is proposed to be levied is for a necessary municipal expense within the meaning of the term as used in the Constitution. *Martin v. City of Raleigh*, 208 N.C. 369, 180 S.E. 786 (1935); *Purser v. Ledbetter*, 227 N.C. 1, 40 S.E.2d 702 (1946).

But Legislative Pronouncement Is Entitled to Great Weight.—What are necessary expenses for a municipal corporation under subsection (5) of this section is a question for the court. However, a legislative pronouncement that a proposed expenditure is a necessary expense is entitled to great weight. *Wilson v. City of High Point*, 238 N.C. 14, 76 S.E.2d 546 (1953).

Operation of Public Schools Is "Necessary Expense."—The operation of the public schools as required by Article IX of the Constitution is a "necessary expense" not requiring a vote of the electorate. *Yoder v. Board of Comm'rs*, 7 N.C. App. 712, 173 S.E.2d 529 (1970).

Operation of the public school system has been held to be a necessary expense, not requiring a vote of the people. *Benvenue Parent-Teacher Ass'n v. Nash County Bd. of Educ.*, 4 N.C. App. 617, 167 S.E.2d 538 (1969).

Maintenance of the public schools and the furnishing of those things which are reasonably essential to that end are within the mandatory provision of N.C. Const., Art. IX, unaffected by the "necessary expense" provision contained in subsection (5) of this section. *Harris v. Board of Comm'rs*, 1 N.C. App. 258, 161 S.E.2d 213 (1968).

Levying School Taxes in Annexed Territory.—Where by special act the legislature grants a charter to an existing city, enlarging the city limits to take in territory within one or more nonlocal tax districts, it is not necessary, nor contrary to subsection

(5) of this section, that a vote of the people within the added territory be had either upon the question of annexing such territory or upon the question of levying school taxes therein, the object of the charter being to provide for the government, welfare and improvement of the city, and not primarily for the mere maintenance of schools. *Hailey v. City of Winston-Salem*, 196 N.C. 17, 144 S.E. 377 (1928).

Statute Authorizing Levy of Tax for County School Capital Reserve Fund.—Section 115-80.1, authorizing a county board of commissioners to levy an ad valorem tax for a county school capital reserve fund, which is to be used for the purpose of anticipating school capital outlays, is a valid exercise of legislative authority; the creation of such fund is for a "necessary expense" within the meaning of subsection (5) of this section, and does not require a vote of the people. *Yoder v. Board of Comm'rs*, 7 N.C. App. 712, 173 S.E.2d 529 (1970).

Expenditure of funds by county for operation of a technical institute for adult vocational and general educational training without a vote of the people does not violate subsection (5) of this section, since in expending such funds the county acts as an agency of the State in carrying out the mandate of N.C. Const., Art. IX, § 2, requiring the General Assembly to provide for a general and uniform system of public instruction. *Benvenue Parent-Teacher Ass'n v. Nash County Bd. of Educ.*, 4 N.C. App. 617, 167 S.E.2d 538 (1969).

Premiums for insurance of public school buildings are a necessary public expense of a county. *Fuller v. Lockhart*, 209 N.C. 61, 182 S.E. 733 (1935).

Water and Sewers.—It has long been decided that water and sewer are "necessary expenses," within the meaning of this section, and a vote of the people is not necessary. *Storm v. Town of Wrightsville Beach*, 189 N.C. 679, 128 S.E. 17 (1925). So, also, are roads. See *Davis v. Lenoir County*, 178 N.C. 668, 101 S.E. 260 (1919); *Drysdale v. Prudden*, 195 N.C. 722, 143 S.E. 530 (1928). See also *Starmount Co. v. Town of Hamilton Lakes*, 205 N.C. 514, 171 S.E. 909 (1933); *Lamb v. City of Randleman*, 206 N.C. 837, 175 S.E. 293 (1934); *Burt v. Town of Biscoe*, 209 N.C. 70, 183 S.E. 1 (1935).

Erection and purchase of courthouse and jails, as authorized by G.S. § 153-77, subdivision (2), is a necessary expense. *Wilson v. City of High Point*, 238 N.C. 14, 76 S.E.2d 546 (1953).

The erection by a city of a building for the operation of its municipal court and for the housing of its police department,

providing space for its city jail and for the performance of other governmental functions, is undoubtedly "a necessary expense" of the city within the meaning of this section. *Wilson v. City of High Point*, 238 N.C. 14, 76 S.E.2d 546 (1953).

An expenditure by a municipality for special training of a police officer is a necessary expense within the meaning of this section. *Green v. Kitchin*, 229 N.C. 450, 50 S.E.2d 545 (1948), discussed in 27 N.C.L. Rev. 500.

The building of a drilling tower to train the city's firemen is not a necessary expense within the meaning of this section. *Wilson v. City of Charlotte*, 206 N.C. 856, 175 S.E. 306 (1934).

The building, maintenance, and operation of public hospitals is not a "necessary expense." *Cole v. City of Asheville*, 2 N.C. App. 652, 163 S.E.2d 628 (1968).

The maintenance of a hospital is not a necessary governmental expense for a city. *Board of Managers v. City of Wilmington*, 237 N.C. 179, 74 S.E.2d 749 (1953).

The construction of an annex to a county hospital, to be used principally for the care of the indigent sick of the county, is not a necessary expense of the county within the meaning of subsection (5) of this section. *Palmer v. County of Haywood*, 212 N.C. 284, 193 S.E. 668, 113 A.L.R. 1195 (1937).

Erection and Maintenance of Dispensary.—Nor is the erection and maintenance of a dispensary such an expense. *Garsed v. City of Greensboro*, 126 N.C. 159, 35 S.E. 254 (1900).

An ambulance service is not a necessary expense. *Cole v. City of Asheville*, 2 N.C. App. 652, 163 S.E.2d 628 (1968).

The expense of operating a city bus system is not a "necessary expense" within the meaning of subsection (5) of this section. Therefore, the city may not pledge its credit nor expend tax revenues to support the operation of a bus system without first obtaining approval by submitting the matter to a vote of the people. *Cole v. City of Asheville*, 2 N.C. App. 652, 163 S.E.2d 628 (1968).

Construction and Maintenance of Airport.—The construction, maintenance and operation of an airport by a city is a public purpose for which funds may be provided by taxation, when approved by a vote of the people in accordance with subsection (5) of this section. *City of Reidsville v. Slade*, 224 N.C. 48, 29 S.E.2d 215 (1944).

Construction, maintenance and operation of a municipal airport is not a necessary expense within the meaning of subsection (5) of this section. *Harrelson v. City of Fayetteville*, 271 N.C. 87, 155 S.E.2d 749 (1967).

The construction of a public airport is not a "necessary expense." *Vance County v. Royster*, 271 N.C. 53, 155 S.E.2d 790 (1967).

While there is no contention that the construction, equipment, and maintenance of an airport and landing field is a necessary municipal expense within the meaning of subsection (5) of this section, yet it may not be improper to say that man's constantly advancing progress in the conquest of the air as a medium for the transportation of commerce and for public and private use indicates the practical advantage and possible future necessity of adequate landing facilities to the same extent that paved streets and roads are now regarded for the purposes of communication and transportation on land. *Goswick v. City of Durham*, 211 N.C. 687, 191 S.E. 728 (1937), citing *Hargrave v. Board of Comm'rs*, 168 N.C. 626, 84 S.E. 1044 (1915).

Urban Redevelopment Plan. — The expenses incurred, or to be incurred, by a municipality in putting into effect an urban redevelopment plan, pursuant to the authority vested in it by the Urban Redevelopment Law, are not expenses incurred, or to be incurred, by a municipality in the maintenance of public peace or administration of justice, do not partake of a governmental nature, and do not purport to be an exercise by a municipality of a portion of the State's delegated sovereignty, and consequently are not "necessary expenses" within the purview of subsection (5) of this section. *Horton v. Redevelopment Comm'n*, 259 N.C. 605, 131 S.E.2d 464 (1963).

An urban redevelopment plan is not a necessary expense of a municipality within the meaning of subsection (5) of this section, and therefore a municipality may be enjoined from spending ad valorem taxes or levying taxes and issuing bonds for an urban redevelopment project until and unless such project is approved by a majority of the qualified voters of such municipality, and any provisions of G.S. §§ 160-466 (b) and 160-470 authorizing a municipality to levy taxes and issue bonds for such purpose without a vote are unconstitutional. *Horton v. Redevelopment Comm'n*, 259 N.C. 605, 131 S.E.2d 464 (1963).

Any provisions of G.S. §§ 160-466 (b) and 160-470 to the effect that bonds may be sold and issued by a redevelopment commission for the purpose of carrying out the provisions of an urban redevelopment plan or project under the provisions of the Urban Redevelopment Law, or that any municipality located within the area of such a commission may appropriate funds

to a redevelopment commission for the purpose of aiding such a commission in carrying out any of its powers and functions under the Urban Redevelopment Law, and to obtain funds for this purpose, the municipality may levy taxes, and may in the manner prescribed by law issue and sell its bonds, without the approval of a vote of the qualified voters in the municipality, are repugnant to the provisions of subsection (5) of this section. *Horton v. Redevelopment Comm'n*, 259 N.C. 605, 131 S.E.2d 464 (1963).

The fact that a municipality constructs streets, lays water and sewer lines, installs traffic controls and electric facilities within an urban redevelopment area, will not change such construction and installations from a necessary to an unnecessary expense of the municipality. *Horton v. Redevelopment Comm'n*, 262 N.C. 306, 137 S.E.2d 115 (1964).

An urban redevelopment project is not a necessary municipal expense, but expenditures made in furtherance thereof constitute a public purpose. *Horton v. Redevelopment Comm'n*, 262 N.C. 306, 137 S.E.2d 115 (1964).

Parks, Playgrounds, Auditoriums and Other Recreational Facilities.—The imposition of a tax or the expenditure of funds derived therefrom for municipal parks and recreational facilities is for a public purpose but it is not for a necessary municipal expense, within the meaning of subsection (5) of this section, and the expenditure of funds for this purpose derived from a tax imposed without a referendum will be enjoined by the courts. *Purser v. Ledbetter*, 227 N.C. 1, 40 S.E.2d 702 (1946).

The acquisition, establishment and operation of an auditorium (G.S. § 160-283), and of playground and recreation centers (G.S. § 160-155 et seq.), are not "necessary expenses" within the meaning of subsection (5) of this section, for which a municipal corporation may borrow money or levy and collect taxes, without an approving vote of the people, but are public purposes for which a municipal corporation may appropriate available surplus funds not derived from taxes or a pledge of its credit. *City of Greensboro v. Smith*, 241 N.C. 363, 85 S.E.2d 292 (1955); *Keeter v. Town of Lake Lure*, 264 N.C. 252, 141 S.E.2d 634 (1965).

Parks, playgrounds and recreation centers are not necessary municipal expenses within the meaning of subsection (5) of this section of the Constitution; however, funds spent for such projects are for a public purpose. *Horton v. Redevelopment*

Comm'n, 262 N.C. 306, 137 S.E.2d 115 (1964).

While parks, playgrounds and recreation centers are for a public purpose, taxes may not be levied therefor without a vote of the people. *Horton v. Redevelopment Comm'n*, 262 N.C. 306, 137 S.E.2d 115 (1964).

Athletic Stadium.—As to school district bonds or taxes for athletic stadium, see *Boney v. Board of Trustees*, 229 N.C. 136, 48 S.E.2d 56 (1948).

A municipal platform is not a public market and such platform erected for the purpose of obtaining revenue for the town by the imposition of a fee for the sale of cotton therefrom is not a necessary municipal expense and the town may not issue its notes for the purchase price of such platform without a vote of its electors. *Walker v. Town of Faison*, 202 N.C. 694, 163 S.E. 875 (1932).

The establishment of a wharf is not a necessary expense. *Henderson v. City of Wilmington*, 191 N.C. 269, 132 S.E. 25 (1926).

The building of a county fence by a county having the free-range law, between it and an adjoining county having the stock law, is not a necessary expense within the meaning of this section. *Keith v. Lockhart*, 171 N.C. 451, 88 S.E. 640 (1916).

Construction and Maintenance of Municipal Hotel.—The legislature is without power to authorize a municipal corporation to issue its bonds and levy a tax for the payment of the principal and interest on such indebtedness, in order to enable it to obtain funds for the construction and maintenance of a municipal hotel. *Nash v. Town of Tarboro*, 227 N.C. 283, 42 S.E.2d 209 (1947).

The sale of intoxicating liquor is not a "necessary expense," nor is it a public purpose or undertaking. *Newman v. Watkins*, 208 N.C. 675, 182 S.E. 453 (1935).

Advertising.—The expenditure by a municipality of funds for the purpose of advertising the advantages of the city in an effort to secure new industry is not for a necessary municipal expense. *Dennis v. City of*

Raleigh, 253 N.C. 400, 116 S.E.2d 923 (1960).

Miscellaneous Applications.—Necessary expenses involve and include the support of the aged and infirm, the laying out and repair of public highways, the construction of bridges, the maintenance of the public peace, and administration of public justice—expenses to enable the county to carry on the work for which it was organized and given a portion of the State's sovereignty. *Horton v. Redevelopment Comm'n*, 259 N.C. 605, 131 S.E.2d 464 (1963).

Improvements to be made by a city for street improvements, traffic controls, water and sewer lines and electric distribution lines, except for parks, off-street parking facilities, a pedestrian plaza development, and the donation of land, fall in the class of necessary expenses within the meaning of this section of the Constitution, and the expenses necessary for the construction thereof may be provided for by the levy of ad valorem taxes. *Horton v. Redevelopment Comm'n*, 262 N.C. 306, 137 S.E.2d 115 (1964).

The sale of refunding bonds under G.S. § 153-77, subdivision (9), is a necessary expense. *Morrow v. Durham*, 210 N.C. 564, 187 S.E. 752 (1936). So also is the issuance of bonds by a county to refinance highway bonds issued by its townships. *Thomson v. Harnett County*, 209 N.C. 662, 184 S.E. 490 (1936). The expense of providing for the medical treatment and hospital care of the indigent sick and afflicted poor under § 160-229 is a necessary expense of a city. *Martin v. City of Raleigh*, 208 N.C. 369, 180 S.E. 786 (1935). See also *Martin v. Board of Comm'rs*, 208 N.C. 354, 180 S.E. 777 (1935).

For other expenses approved as "necessary" within the purview of this section, see *Horton v. Redevelopment Comm'n*, 259 N.C. 605, 131 S.E.2d 464 (1963).

For other expenses held not "necessary" within the purview of subsection (5) of this section, see *Horton v. Redevelopment Comm'n*, 259 N.C. 605, 131 S.E.2d 464 (1963); *Cole v. City of Asheville*, 2 N.C. App. 652, 163 S.E.2d 628 (1968).

Sec. 3. *Limitations upon the increase of State debt.*

(1) *Authorized purposes; two-thirds limitation.* The General Assembly may contract debts and pledge the faith and credit of the State for the following purposes:

To fund or refund a valid existing debt;

To borrow in anticipation of the collection of taxes due and payable within the fiscal year to an amount not exceeding 50 percent of such taxes;

To supply a casual deficit;

To suppress riots or insurrections, or to repel invasions.

For any purpose other than these enumerated, the General Assembly shall have no power, during any biennium, to contract new debts on behalf of the State to

an amount in excess of two-thirds of the amount by which the State's outstanding indebtedness shall have been reduced during the next preceding biennium, unless the subject is submitted to a vote of the people of the State. In any election held in the State under the provisions of this Section, the proposed indebtedness shall be approved by a majority of the qualified voters who vote thereon.

(2) *Gift or loan of credit prohibited.* The General Assembly shall have no power to give or lend the credit of the State in aid of any person, association, or corporation, except a corporation in which the State has a controlling interest, unless the subject is submitted to a direct vote of the people of the State and is approved by a majority of the qualified voters who vote thereon.

(3) *Certain debts barred.* The General Assembly shall never assume or pay any debt or obligation, express or implied, incurred in aid of insurrection or rebellion against the United States. Neither shall the General Assembly assume or pay any debt or bond incurred or issued by authority of the Convention of 1868, the special session of the General Assembly of 1868, or the General Assemblies of 1868-69 or 1869-70, unless the subject is submitted to the people of the State and is approved by a majority of all the qualified voters at a referendum held for that sole purpose.

Cross Reference.—For similar provisions applicable to local governments, see § 4 of this article and the note thereto.

Editor's Note.—The provisions of subsections (1) and (2) of this section are similar to those of Art. V, § 4, Const. 1868, as amended in 1924 and 1936, and the provisions of subsection (3) are similar to those of Art. I, § 6, Const. 1868, as amended in 1872-73 and 1880. The cases in the following annotation were decided under those sections.

Purpose.—As to the purpose of this section, see *Pennington v. Town of Tarboro*, 180 N.C. 438, 105 S.E. 199 (1920) (dissenting opinion).

The language of this section is unambiguous, and by its plain terms the power of the State to contract debts in any biennium without submitting the matter to a vote of the people, except for those purposes specifically enumerated in the section, is definitely prescribed to two thirds of the amount by which its outstanding indebtedness was decreased during the prior biennium. *Hallyburton v. Board of Educ.*, 213 N.C. 9, 195 S.E. 21 (1938).

The Constitution gives to the people the power to decide whether or not to contract a debt by requiring their duly elected representatives to submit the question to them for their approval before the indebtedness is assumed. *Vance County v. Royster*, 271 N.C. 53, 155 S.E.2d 790 (1967); *Cole v. City of Asheville*, 2 N.C. App. 652, 163 S.E.2d 628 (1968).

Subsection (2) Does Not Apply to School System.—Subsection (2) of this section is an inhibition on giving or lending the credit of the State to third persons, individual or corporate, and of the kind contemplated in the provision; and cannot be construed

to affect the mandatory provisions of Art. IX as to the maintenance of a statewide school system by legislative enactment. *Lacy v. Fidelity Bank*, 183 N.C. 373, 111 S.E. 612 (1922).

Nor Does It Apply to Insuring School Property.—A county board of education has the authority to insure school property in a mutual fire insurance company authorized to do business in this State, and assume the contingent liability limited to the amount of the cash premium, and the execution of such policy does not lend the credit of the State to a private corporation under this section. *Fuller v. Lockhart*, 209 N.C. 61, 182 S.E. 733 (1935).

Issuing Bonds to Aid War Veterans.—A statute for the purpose of issuing bonds, passed by the legislature and which has been approved by the vote of the people of the State at an election duly had for the purpose, providing for an issuance and sale of State bonds for the purpose of lending the proceeds on mortgage to a certain amount of the value of the land to the veterans of the World War to help them in providing homes for themselves, is the pledging of the credit of the State for a public purpose, and is a valid exercise of statutory authority. *Hinton v. Lacy*, 193 N.C. 496, 137 S.E. 669 (1927).

Vote of People Necessary to Aid New Railroad.—The General Assembly has no power to contract a debt, without a vote of the people, to aid in the construction of, or build a new railroad. *University R.R. v. Holden*, 63 N.C. 410 (1869).

Issuing Bonds to Pay for Stock.—A subscription for stock in a corporation and issuing bonds to pay for such stock is a gift of the credit of the State, within the meaning of this section. *Galloway v. Jenkins*, 63 N.C. 147 (1869).

Lease of Facility of Ports Authority to Private Corporation.—Lease of facility by Port Authority to a private corporation under the terms of which the corporation would pay during a five year term all costs of operation of facility and rentals sufficient to retire in full revenue bonds issued by the Port Authority did not constitute a loan of the credit of the State or the agency. *North Carolina State Ports Authority v. First-Citizens Bank & Trust Co.*, 242 N.C. 416, 88 S.E.2d 109 (1955).

National Park Act.—The statute establishing the North Carolina National Park Commission (Laws 1927, c. 48) with the certain powers therein enumerated is for the benefit of the public of the State and not that of some third person, and does not fall within the provision of this section. *Yarborough v. North Carolina Park Comm'n*, 196 N.C. 284, 145 S.E. 563 (1928).

Turnpike Revenue Bonds. — Since the Turnpike Authority's revenue bonds do

not create a debt within the meaning of the Constitution, the limitations of this section are inapplicable. *North Carolina Tpk. Authority v. Pine Island, Inc.*, 265 N.C. 109, 143 S.E.2d 319 (1965).

Claims Barred by Subsection (3).—Proceedings to settle and adjudge the legal validity of claims against the State were dismissed in *Baltzer v. State*, 104 N.C. 265, 10 S.E. 153 (1889), for the reason that the General Assembly was expressly forbidden by [subsection (3) of] this section to pay the claim presented therein, the Supreme Court of North Carolina saying that "it would be idle, futile and ridiculous for this court to declare and adjudge the validity of a claim, against the State, and recommend to the General Assembly to provide for its payment, when the Constitution expressly forbids it to pay or provide for the payment of such a claim." *Calkins Dredging Co. v. State*, 191 N.C. 243, 131 S.E. 665 (1926).

Sec. 4. *Limitations upon the increase of local debt.*

(1) *Authorized; purposes; two-thirds limitation.* The General Assembly may authorize counties, cities and towns, and other units of local government to contract debts and pledge their faith and credit for the following purposes:

To fund or refund a valid existing debt;

To borrow in anticipation of the collection of taxes due and payable within the fiscal year to an amount not exceeding 50 per cent of such taxes;

To supply a casual deficit;

To suppress riots or insurrections.

For any purpose other than these enumerated, the General Assembly shall have no power to authorize counties, cities and towns, and other units of local government to contract debts, and counties, cities and towns, and other units of local government shall not contract debts, during any fiscal year, to an amount exceeding two-thirds of the amount by which the outstanding indebtedness of the particular county, city or town, or other unit of local government shall have been reduced during the next preceding fiscal year, unless the subject is submitted to a vote of the people of the particular county, city or town, or other unit of local government and is approved by a majority of the qualified voters who vote thereon.

(2) *Necessary expense limitation.* No county, city or town, or other unit of local government shall contract any debt, pledge its faith, or lend its credit except for the necessary expenses thereof, unless approved by a majority of the qualified voters who shall vote thereon in any election held for that purpose.

(3) *Certain debts barred.* No county, city or town, or other unit of local government shall assume or pay, nor shall any tax be levied or collected for the payment of, any debt, or the interest upon any debt, contracted directly or indirectly in aid or support of rebellion.

I. Editor's Note.

II. Purposes; Two-Thirds Limitation.

III. Necessary Expense Limitation.

A. General Consideration.

B. What Are "Necessary Expenses."

1. In General.

2. Illustrative Cases.

C. Operation and Maintenance of Schools.

IV. Debts in Aid of Rebellion.

I. EDITOR'S NOTE.

The provisions of subsection (1) of this section are similar to those of Art. V, § 4, Const. 1868, as amended in 1924 and 1936. The provisions of subsection (2) are similar to those of Art. VII, § 6, Const. 1868, as amended in 1948 and 1962.

The provisions of subsection (3) are similar to those of Art. VII, § 9, Const. 1868, as amended in 1936 and 1962. The cases in the following annotation were decided under those sections.

II. PURPOSES; TWO-THIRDS LIMITATION.

Cross Reference.—For similar provisions applicable to the State, see § 3 of this article and the note thereto.

Purpose of Subsection (1).—As to the purpose of subsection (1) of this section, see *Pennington v. Town of Tarboro*, 180 N.C. 438, 105 S.E. 199 (1920) (dissenting opinion).

The provisions of subsection (1) of this section now constitute the dominant or controlling limitation upon the power of local units to contract debts or to issue bonds, and its provisions are superimposed upon the limitations contained in subsection (2) of this section and § 2 of this article. *Coe v. Surry County*, 226 N.C. 125, 36 S.E.2d 910 (1946).

The limitation prescribed by subsection (1) of this section is in addition to other constitutional limitations relating to taxation prescribed by this section and Art. V, § 6, and a county may not borrow money, even for a necessary expense, without submitting the question to a vote, when its outstanding indebtedness has not been reduced during the prior fiscal year, and a taxpayer is entitled to injunctive relief restraining the issuance of the proposed bonds. *Hallyburton v. Board of Educ.*, 213 N.C. 9, 195 S.E. 21 (1938).

The language of subsection (1) of this section is unambiguous, and by its plain terms the power of any county or municipality to contract debts in any fiscal year, without submitting the matter to a vote of the people, except for those purposes specifically enumerated in the amendment, is definitely prescribed to two thirds of the amount by which its outstanding indebtedness was decreased during the prior fiscal year. *Hallyburton v. Board of Educ.*, 213 N.C. 9, 195 S.E. 21 (1938).

The Constitution gives to people the power to decide whether or not to contract a debt by requiring their duly elected representatives to submit the question to them for their approval before the indebtedness is assumed. *Vance County v. Royster*, 271 N.C. 53, 155 S.E.2d 790 (1967); *Cole v. City of Asheville*, 2 N.C. App. 652, 163 S.E.2d 628 (1968).

The provision of subsection (1) of this section, imposing a limitation upon the power of the State, counties and munic-

ipalities to contract debts without a vote of the people, does not deprive the county of any power to contract a debt. It merely declares who shall have the power of decision. *Vance County v. Royster*, 271 N.C. 53, 155 S.E.2d 790 (1967); *Cole v. City of Asheville*, 2 N.C. App. 652, 163 S.E.2d 628 (1968).

Bonds in excess of two thirds of amount by which taxing unit decreased its outstanding debt during prior fiscal year may be issued upon the approval of a majority of those voting under subsection (1) of this section. *Twining v. City of Wilmington*, 214 N.C. 655, 200 S.E. 416 (1939).

When a proposed bond issue is in excess of two thirds of the amount by which the issuing county reduced its outstanding indebtedness during the prior fiscal year, the question must be submitted to a vote and issuance approved by a majority of the voters who shall vote thereon regardless of the purpose of the bonds, unless the purpose is within the specific exceptions enumerated in subsection (1) of this section. *Sessions v. Columbus County*, 214 N.C. 634, 200 S.E. 418 (1939).

In determining the amount of debt contracted in any fiscal year within the provision of subsection (1) of this section, limiting the power of a taxing unit to contract debts to two thirds the amount by which the taxing unit's outstanding debt was decreased during the prior fiscal year, the total amount of bonds issued during the fiscal year, by the taxing unit, whether with or without the approval of its voters, should be included, except bonds issued by it to fund or refund a valid existing debt, to supply a casual deficit, to suppress riots or insurrections, or to repel invasions, and except tax anticipation notes issued in an amount not exceeding fifty per centum of the taxes for the fiscal year. *Hallyburton v. Board of Educ.*, 213 N.C. 9, 195 S.E. 21 (1938).

Bonds are outstanding within the meaning of subsection (1) of this section until actually paid and canceled, or delivered to the county for cancellation. *Coe v. Surry County*, 226 N.C. 125, 36 S.E.2d 910 (1946).

Thus, where county bonds were payable at a certain banking institution on the first day of a county fiscal year, and before the close of the next preceding fiscal year the county made available funds for payment thereof, the bonds were outstanding at the close of the latter year within the meaning of subsection (1) of this section. *Coe v. Surry County*, 226 N.C. 125, 36 S.E.2d 910 (1946).

Year Debt Contracted. — The debt is contracted during the fiscal year following that in which the debt was reduced, even though the certificate of the secretary of the local government commission required by G.S. § 159-18 was not executed within that time. *Board of Educ. v. State Bd. of Educ.*, 217 N.C. 90, 6 S.E.2d 833 (1940).

Refunding Bonds. — During the prior fiscal year defendant county began refunding operations, and during that year issued its refunding bonds, but did not retire the bonds refunded until the first day of the present fiscal year. Plaintiff contended that since both the refunding bonds and the bonds refunded were outstanding during the prior fiscal year, there had been an increase rather than a decrease in the county's outstanding indebtedness during the prior fiscal year. It was held that the failure of the county to complete its refunding operations during the prior fiscal year is immaterial, and the refunding bonds should not be included in determining the amount by which the county had reduced its outstanding indebtedness during the prior fiscal year within the meaning of the constitutional limitation on an increase of debt by counties and municipalities. *Royal v. Sampson County*, 214 N.C. 259, 199 S.E. 15 (1938).

Where a proposed county bond issue was to refund a valid existing debt of the county within the meaning of subsection (1) of this section, under the exception therein provided a vote was unnecessary, nor could the means for the repayment of the bonds be adversely affected by any constitutional change. *Thompson v. Harnett County*, 212 N.C. 214, 193 S.E. 158 (1937).

Bonds for Streets and Sewage.—A municipality may not issue bonds for street and sewage construction or extension without a vote when, during the fiscal year, such city has issued bonds with the approval of the voters in excess of the amount by which it had reduced its outstanding indebtedness during the prior fiscal year, the purpose of subsection (1) of this section being to limit the existing power of the governing authorities to issue bonds for necessary expenses so that the net indebtedness of the taxing unit should not be increased beyond the limits prescribed in the amendment, except with the approval of its voters. *Gill v. City of Charlotte*, 213 N.C. 160, 195 S.E. 368 (1938).

Bonds for Municipal Power Plant.—A contract of a municipality to construct a municipal electric power plant and to issue

its bonds to pay for same, with provision that principal and interest of the bonds should be paid exclusively from the profits from the plant without resort to funds raised by taxation, does not create a "debt" of the municipality within the meaning of subsection (1) of this section, which prohibits the contraction of a debt by a municipality in any fiscal year in excess of two thirds of the amount by which its debt was decreased during the prior fiscal year. *Williamson v. City of High Point*, 213 N.C. 96, 195 S.E. 90 (1938). See also *McGuinn v. City of High Point*, 219 N.C. 56, 13 S.E.2d 48 (1941).

In an election for the issuance of county bonds for a new school building, a necessary expense, a favorable vote of the majority of those voting is sufficient to validate the bond resolution and authorize the issuance and sale of the proposed bonds. *Mason v. Moore County Bd. of Comm'rs*, 229 N.C. 626, 51 S.E.2d 6 (1948).

Local bond issue of town of Lake Lure held not to violate this section. *Keeter v. Town of Lake Lure*, 264 N.C. 252, 141 S.E.2d 634 (1965).

III. NECESSARY EXPENSE LIMITATION.

A. General Consideration.

Cross Reference.—See also § 2 of this article and the note thereto.

Editor's Note.—For article on "Necessary Expenses," see 18 N.C.L. Rev. 93. For note on "necessary expenses" of municipal corporations under this section, see 30 N.C.L. Rev. 313 (1952). For note entitled "Necessary Expense' Limitation—Four Recent Developments," see 43 N.C.L. Rev. 372 (1965).

Vance County v. Royster, 271 N.C. 53, 155 S.E.2d 790 (1967), cited in the note below, was commented on in 46 N.C.L. Rev. 188 (1967).

In General.—Subsection (2) of this section does not require that a debt, to be contracted for necessary expenses by a city or town, shall be submitted to a vote of the people therein. *Tucker v. City of Raleigh*, 75 N.C. 267 (1876); *Jones v. City of New Bern*, 152 N.C. 64, 67 S.E. 173 (1910).

Under subsection (2) of this section as construed with subsection (4) of § 1 of this article, a municipality may issue valid bonds for its necessary expenses without the approval of its voters within the constitutional limitation in the absence of statutory authority, and with statutory authority and the approval of its voters it may

issue bonds in excess of this limitation. *Burleson v. Board of Aldermen*, 200 N.C. 30, 156 S.E. 241 (1930).

Intent of Subsection (2).—Subsection (2) of this section was intended to present another check to the imprudence of county and municipal officers. *Paine v. Caldwell*, 65 N.C. 488 (1871).

Subsection (2) of this section is an absolute prohibition. It is cumulative and adds another restraint to subsection (4) of § 2 of this article. *Brodnax v. Groom*, 64 N.C. 244 (1870).

Cannot Be Evaded by Legislature.—Subsection (2) of this section prohibits any county, city, town or other municipal corporation, from contracting any debt, etc., without the affirmative consent of a majority of the people of the county who are qualified to vote [now a majority of the qualified voters who shall vote thereon], and a legislative act which attempts to evade the restriction which this subsection puts on counties, etc., to contract debts, is unconstitutional and void. *Chester & Lenoir Narrow Gauge R.R. v. Commissioners of Caldwell County*, 72 N.C. 486 (1875).

The Constitution gives the people the power to decide whether to contract a debt by requiring their duly elected representatives to submit the question to them for their approval before the indebtedness is assumed. *Vance County v. Royster*, 271 N.C. 53, 155 S.E.2d 790 (1967); *Cole v. City of Asheville*, 2 N.C. App. 652, 163 S.E.2d 628 (1968).

The Constitution proceeds upon the theory that if it is, indeed, wise to contract an indebtedness for an unnecessary county or city expense, the people of the county or city will recognize this when the facts are presented to them and will approve the assumption of the obligation and, if they do not approve it, it ought not to be undertaken at their expense even though the county or city commissioners, and the courts as well, deem it wise to do so. *Vance County v. Royster*, 271 N.C. 53, 155 S.E.2d 790 (1967); *Cole v. City of Asheville*, 2 N.C. App. 652, 163 S.E.2d 628 (1968).

The provision of subsection (2) of this section, imposing a limitation upon the power of counties and municipalities to contract debts without a vote of the people, does not deprive the county of any power to contract a debt. It merely declares who shall have the power of decision. *Vance County v. Royster*, 271 N.C. 53, 155 S.E.2d 790 (1967).

The Constitution not only forbids the

levying and expenditure of a tax for a purpose other than a "necessary expense," it also forbids the contracting of any debt for such purpose without first submitting the matter to a vote of the people. *Vance County v. Royster*, 271 N.C. 53, 155 S.E.2d 790 (1967).

Rigid Observance.—The necessity of a rigid observance of subsection (2) of this section has been emphasized by G.S. § 160-62. *Horton v. Redevelopment Comm'n*, 259 N.C. 605, 131 S.E.2d 464 (1963).

It is within the discretion of the legislature to authorize a county to issue bonds for necessary expenses, either with or without the approval of its voters, or to require only the approval by a majority of the votes cast at a special election authorized for the purpose, and the approval by the majority of the qualified voters is not required for their validity. *Davis v. Lenoir County*, 178 N.C. 668, 101 S.E. 260 (1919).

Function Must Be Public.—A municipal corporation cannot, even with express legislative sanction, embark on any private enterprise or assume any function which is not in a legal sense public. *Brown v. Board of Comm'rs*, 223 N.C. 744, 28 S.E.2d 104 (1943).

A municipal corporation cannot, even with express legislative sanction, engage in any private enterprise or assume any function which is not in a legal sense public in nature, the word "private" as used in opinions discussing the powers of a municipality being used to designate proprietary, as distinguished from governmental, functions. *Keeter v. Town of Lake Lure*, 264 N.C. 252, 141 S.E.2d 634 (1965).

The term "municipal corporation" should not be construed narrowly to include only cities, towns, counties and school districts, as the Constitution contemplates a broader construction of the term, and in its broader sense the term includes all public corporations exercising governmental functions within the constitutional limitations. *Wells v. Housing Authority*, 213 N.C. 744, 197 S.E. 693 (1938); *Carolina-Virginia Coastal Highway v. Coastal Tpk. Authority*, 237 N.C. 52, 74 S.E.2d 310 (1953).

The State is not a municipality within the meaning of the Constitution. It may perform the duties required of it by the Constitution, as well as exercise those powers not otherwise prohibited, without embarrassment by constitutional limitations expressly operating on municipalities alone. *Harris v. Board of Comm'rs*, 1 N.C. App. 258, 161 S.E.2d 213 (1968).

Debt.—Subsections (1) and (2) of this section will be considered in *pari materia*,

and the word "debt" in subsection (1) will be given the same construction as has been given the word in construing subsection (2). *Williamson v. City of High Point*, 213 N.C. 96, 195 S.E. 90 (1938). See also *McGuinn v. City of High Point*, 219 N.C. 56, 13 S.E.2d 48 (1941).

When Bonds Are Not a "Debt".—Bonds of a city, issued for the purpose of acquiring revenue-producing property and which expressly provide that only the revenues produced by such property shall be used for or subject to demand for payment of such bonds, are not a "debt" of the city within the meaning of subsection (2) of this section. *Vance County v. Royster*, 271 N.C. 53, 155 S.E.2d 790 (1967).

Refunding Bonds.—A municipal corporation does not contract a debt, within the meaning of subsection (2) of this section, when under statutory authority it issues bonds to refund bonds which at the date of the issuance of the refunding bonds are valid and enforceable obligations of the corporation. *Bolich v. City of Winston-Salem*, 202 N.C. 786, 164 S.E. 361 (1932).

Authority to Issue Bonds Implies Authority to Levy Taxes for Payment of Bonds.—The exercise by a municipal corporation of the power to pledge its credit is an incipient step in the exercise of the power of taxation, and authority given to a municipality to issue bonds necessarily involves the power to levy taxes for the payment of interest on said bonds and the payment of said bonds at maturity. *Wilson v. City of High Point*, 238 N.C. 14, 76 S.E.2d 546 (1953).

When Funds Are Already on Hand.—Subsection (2) of this section has no application where the funds to be applied are already on hand and the proposed expenditure will impose no further liability on the municipality. *Adams v. City of Durham*, 189 N.C. 232, 126 S.E. 611 (1925).

The acquisition of the land for a municipal airport from surplus funds was not beyond the power of the city and it in no way offended the provisions of subsection (2) of this section. *Goswick v. City of Durham*, 211 N.C. 687, 191 S.E. 728 (1937).

Where appropriations were made by two cities and county to airport authority out of funds not derived from ad valorem taxes and funds were free from other specified purpose or legal commitment, no question of credit in violation of subsection (2) of this section is involved. *Greensboro-High Point Airport Authority v. Johnson*, 226

N.C. 1, 36 S.E.2d 803 (1946), distinguishing *Sing v. City of Charlotte*, 213 N.C. 60, 195 S.E. 271 (1938).

Agreement to Contribute Nontax Revenue for Airport.—Even though an agreement between a city and a county and the federal government be construed to obligate the city and county to spend only nontax revenue for the maintenance and operation of an airport, the county and city are without authority to incur such debt without the approval of the voters, since this section prohibits the incurrence of a debt for other than a necessary expense without a vote regardless of whether the future obligation constitutes a charge on funds derived from taxation or otherwise. *Vance County v. Royster*, 271 N.C. 53, 155 S.E.2d 790 (1967).

A contract between a county and one of its municipalities to contribute funds for the construction and operation of an airport, without submitting the question to a vote, is invalid, even if the contribution of funds for the construction of the airport is made from nontax revenue, where the contract is indivisible and the pledging of future operating funds is unlimited, and, even if limited to nontax revenue, would be unconstitutional. *Yokley v. Clark*, 262 N.C. 218, 136 S.E.2d 564 (1964).

Where a city sells land used for recreation purposes and turns the proceeds of the sale over to its park and recreation commission, the action is not a pledging of its faith and credit so as to involve the application of subsection (2) of this section. *Hall v. Redd*, 196 N.C. 622, 146 S.E. 583 (1929).

Distinct Debts May Be Voted for in One Ballot Box.—An issue of municipal bonds, when approved by the voters, under the authority of a statute passed according to the constitutional requirements, is not invalid because there were several distinct debts provided and voted for in one ballot box. Subsection (2) of this section does not require that the vote upon each distinct proposition must be in a separate ballot box. *Smith v. Town of Belhaven*, 150 N.C. 156, 63 S.E. 610 (1909).

Only a single proposition may be placed on the ballot for submission to the voters in a bond election, since the submission of dual propositions would defeat the right of the voters to express their choice. *Jamison v. City of Charlotte*, 239 N.C. 682, 80 S.E.2d 904 (1954).

Submission of Question of Issuance of County Bonds and City Bonds.—In a bond election in a county and a city situate therein, the submission to the voters of

the question of the issuance of county bonds in a stipulated sum and city bonds in a stipulated sum for the purpose of providing funds for erecting and equipping public libraries for the city and for the county, and the imposition of a tax within the city for the payment of the city bonds and a tax in the entire county, including the city, for the payment of the county, as a single question, is the submission of but a single proposition so related and united as to form a rounded whole and does not violate subsection (2) of this section. *Jamison v. City of Charlotte*, 239 N.C. 682, 80 S.E.2d 904 (1954).

Endorsement of Township Bonds by County.—Where townships are permitted to call an election for the purpose of voting upon the issuance of township bonds for the roads of the township, the proceeds to be turned over to the sole management and control of the township commissioners, with further provision that the county endorse the bonds upon being satisfied of the validity of the issuance, the endorsement by the county of the township bonds is a loan of the credit of the county, without benefit to the other townships, and contrary to subsection (2) of this section. *Commissioners of Bladen County v. Boring*, 175 N.C. 105, 95 S.E. 43 (1918).

Act Not Limiting Amount of Bonds.—An exception to the constitutionality of an act submitting the question of a bond issue to the voters cannot be sustained on the ground that it does not limit the amount of the bonds that may be issued for the purposes therein authorized. *Waters v. Board of Comm'rs*, 186 N.C. 719, 120 S.E. 450 (1923).

B. What Are "Necessary Expenses."

1. In General.

"Necessary Expenses" Defined. — The term "necessary expenses" is not confined to expenses incurred for purposes absolutely necessary to the very life and existence of a municipality, but it has a more comprehensive meaning. *Storm v. Town of Wrightsville Beach*, 189 N.C. 679, 128 S.E. 17 (1925).

The term "necessary expense" more especially refers "to the ordinary and usual expenditures reasonably required to enable a county to properly perform its duties as part of the State government." *Horton v. Redevelopment Comm'n*, 259 N.C. 605, 131 S.E.2d 464 (1963); *Cole v. City of Asheville*, 2 N.C. App. 652, 163 S.E.2d 628 (1968).

The test of a "necessary expense" is the purpose for which the expense is to be incurred.—If the purpose is the maintenance of the public peace or the administration of justice; if it partakes of a governmental nature or purports to be an exercise by the city of a portion of the State's delegated sovereignty; if in brief, it involves a necessary governmental expense. *Cole v. City of Asheville*, 2 N.C. App. 652, 163 S.E.2d 628 (1968).

Where the purpose for which a proposed expense is to be incurred by a municipality is the maintenance of public peace or administration of justice, or partakes of a governmental nature, or purports to be an exercise by the municipality of a portion of the State's delegated sovereignty, the expense is a necessary expense within subsection (2) of this section, and may be incurred without a vote of the people. *Green v. Kitchin*, 229 N.C. 450, 50 S.E.2d 545 (1948), discussed in 27 N.C.L. Rev. 500; *Wilson v. City of High Point*, 238 N.C. 14, 76 S.E.2d 546 (1953); *Horton v. Redevelopment Comm'n*, 259 N.C. 605, 131 S.E.2d 464 (1963).

Where the expense is for the administration of justice, maintenance of the public peace, or partakes of a governmental nature, or if it is an exercise by the municipality of a portion of the State's delegated sovereignty, then the expense is a necessary expense under subsection (2) of this section, and there need not be a vote of the people. *Cole v. City of Asheville*, 2 N.C. App. 652, 163 S.E.2d 628 (1968).

The cases declaring certain expenses to be necessary refer to some phase of municipal government. *Cole v. City of Asheville*, 2 N.C. App. 652, 163 S.E.2d 628 (1968).

Province of Court.—It has become the accepted meaning of subsection (2) of this section that it is the province of the courts to decide whether a particular municipal expense falls within the category of necessary expenses, leaving to the municipal authorities the power to determine whether a proposed expense within that category is necessary in a given case. *Starmount Co. v. Ohio Sav. Bank & Trust Co.*, 55 F.2d 649 (4th Cir. 1932).

What are necessary expenses for a municipal corporation for which it may contract a debt, pledge its faith, or loan its credit without an approving vote of a majority of those who shall vote thereon in an election held for such purpose, is a question for the court. *Horton v. Redevelopment Comm'n*, 259 N.C. 605, 131 S.E.2d 464 (1963).

It is not for the court to determine the wisdom of a decision to contract a debt for a county or a city, but it is the duty of the court to determine whether the proposed indebtedness is for a "necessary expense" within the meaning of subsection (2) of this section. *Vance County v. Royster*, 271 N.C. 53, 155 S.E.2d 790 (1967); *Cole v. City of Asheville*, 2 N.C. App. 652, 163 S.E.2d 628 (1968).

What is a necessary expense within the meaning of subsection (2) of this section is for the determination of the Supreme Court, not the General Assembly. *DeLoatch v. Beamon*, 252 N.C. 754, 114 S.E.2d 711 (1960); *Dennis v. City of Raleigh*, 253 N.C. 400, 116 S.E.2d 923 (1960).

What are necessary expenses for a municipal corporation under subsection (2) of this section is a question for the court. However, a legislative pronouncement that a proposed expenditure is a necessary expense is entitled to great weight. *Wilson v. City of High Point*, 238 N.C. 14, 76 S.E.2d 546 (1953).

The courts determine whether a given project is a necessary expense of a municipality, but the governing authorities of the municipality determine in their discretion whether such given project is necessary or needed in the designated locality. *Starmount Co. v. Town of Hamilton Lakes*, 205 N.C. 514, 171 S.E. 909 (1933); *Nantahala Power & Light Co. v. County of Clay*, 213 N.C. 698, 197 S.E. 603 (1938).

Presumption on Appeal.—Under legislative authority a county may issue bonds to refund its existing floating debt for necessary county expenses, in excess of the twenty cents limitation upon the one hundred dollar valuation of its taxable property according to subsection (4) of § 2 of this article, when coming within the provisions of the Municipal Finance Act, c. 81, § 8, Public Laws of 1927, and where the record on appeal states that the issuance of the bonds is for necessary county purposes, and for taking care of its floating indebtedness, it will be assumed on appeal that the excess over the twenty cents valuation was for necessary county expenses, coming within the provision of subsection (2) of this section, not requiring the question of the issuance of the bonds to be submitted to the voters of the county. *Board of Comm'rs v. Assell, Goetz & Moerlien, Inc.*, 194 N.C. 412, 140 S.E. 34 (1927).

No Right Vested by Former Construction.—A public service corporation, which was granted a franchise and entered into a contract with a city when, under Art.

VII, § 6, Const. 1868, as then construed, the city was without power to construct competing works, but which constitutional provision was subsequently construed to grant such power, had no standing, after its franchise and contract had expired by limitation, to invoke the rule that one acquiring rights under one construction of a state law may not be deprived of them by a subsequent different construction. *Hill v. Elizabeth City*, 298 F. 67 (4th Cir. 1924).

2. Illustrative Cases.

Construction and Maintenance of Highways.—Bonds issued by a county for the construction and maintenance of its highways are for a necessary county expense within the intent and meaning of subsection (2) of this section, and may be validly authorized by general or special statute and issued by the county thereunder without submitting the question of their issuance to the approval of the voters of the county. *Barbour v. County of Wake*, 197 N.C. 314, 148 S.E. 470 (1929).

Construction of Municipal Electric Power Plant.—Bonds for the construction of a municipal electric power plant are for a public purpose and a necessary municipal expense, and may be issued up to the constitutional limitation without a vote of its electors and without legislative authority, and in excess of the constitutional limitation by legislative authority without a vote of the people. *Williamson v. City of High Point*, 213 N.C. 96, 195 S.E. 90 (1938).

Expansion of City's Power Lines.—Where an incorporated city under authority of statute furnishes through its own transmission lines electricity for its citizens for hire within a circumscribed territory adjoining its limits, and the expenses incident thereto are paid out of its surplus profits, the proposition is not one that requires the approval of the voters as it does not fall within the provisions of subsection (2) of this section. *Holmes v. City of Fayetteville*, 197 N.C. 740, 150 S.E. 624 (1929).

Water and Sewers.—It has long been decided that water and sewer are "necessary expenses," within the meaning of subsection (2) of this section, and a vote of the people is not necessary. *Storm v. Town of Wrightsville Beach*, 189 N.C. 679, 128 S.E. 17 (1925). So, also, are roads. See *Davis v. Lenoir County*, 178 N.C. 668, 101 S.E. 260 (1919); *Drysdale v. Prudden*, 195 N.C. 722, 143 S.E. 530 (1928). See also *Starmount Co. v. Town of Hamilton Lakes*, 205 N.C. 514, 171 S.E. 909 (1933);

Lamb v. City of Randleman, 206 N.C. 837, 175 S.E. 293 (1934); Burt v. Town of Biscoe, 209 N.C. 70, 183 S.E. 1 (1935).

Erection and purchase of courthouse and jails, as authorized by G.S. § 153-77, subdivision (2), is a necessary expense. Wilson v. City of High Point, 238 N.C. 14, 76 S.E.2d 546 (1953).

The erection by a city of a building for the operation of its municipal court and for the housing of its police department, providing space for its city jail and for the performance of other governmental functions, is undoubtedly "a necessary expense" of the city within the meaning of subsection (2) of this section. Wilson v. City of High Point, 238 N.C. 14, 76 S.E.2d 546 (1953).

Building for Joint Use of City and County.—The issuance of bonds by a city to pay the total cost of the erection of a building in the city for the joint use of the city and the county—the city to use the building for its municipal court, its police department and other governmental functions, and the county to use the building for holding terms of the superior court, and for other governmental functions necessary or proper to be performed in the city—is not a necessary expense of the city within the meaning of subsection (2) of this section, when the county will be required eventually to purchase the building from the city, according to a contract between them. Wilson v. City of High Point, 238 N.C. 14, 76 S.E.2d 546 (1953).

The building, maintenance, and operation of public hospitals is not a "necessary expense." Cole v. City of Asheville, 2 N.C. App. 652, 163 S.E.2d 628 (1968).

The maintenance of a hospital is not a necessary governmental expense for a city. Board of Managers v. City of Wilmington, 237 N.C. 179, 74 S.E.2d 749 (1953).

The construction of an annex to a county hospital, to be used principally for the care of the indigent sick of the county, is not a necessary expense of the county within the meaning of subsection (2) of this section. Palmer v. County of Haywood, 212 N.C. 284, 193 S.E. 668, 113 A.L.R. 1195 (1937).

An ambulance service is not a necessary expense. Cole v. City of Asheville, 2 N.C. App. 652, 163 S.E.2d 628 (1968).

The expense of operating a city bus system is not a "necessary expense" within the meaning of subsection (2) of this section. Therefore, the city may not pledge its credit nor expend tax revenues to support the operation of a bus system without first obtaining approval by submitting the matter to a vote of the people. Cole v.

City of Asheville, 2 N.C. App. 652, 163 S.E.2d 628 (1968).

Construction, maintenance and operation of a municipal airport is not a necessary expense within the meaning of subsection (2) of this section. Harrelson v. City of Fayetteville, 271 N.C. 87, 155 S.E.2d 749 (1967).

The construction of a public airport is not a "necessary expense." Vance County v. Royster, 271 N.C. 53, 155 S.E.2d 790 (1967).

While there is no contention that the construction, equipment, and maintenance of an airport and landing field is a necessary municipal expense within the meaning of subsection (2) of this section, yet it may not be improper to say that man's constantly advancing progress in the conquest of the air as a medium for the transportation of commerce and for public and private use indicates the practical advantage and possible future necessity of adequate landing facilities to the same extent that paved streets and roads are now regarded for the purposes of communication and transportation on land. Goswick v. City of Durham, 211 N.C. 687, 191 S.E. 728 (1937), citing Hargrave v. Board of Comm'rs, 168 N.C. 626, 84 S.E. 1044 (1915).

A county or city may not contract a debt or pledge its faith for the construction or operation of an airport without first submitting the question to a vote of the people of such county or city. Vance County v. Royster, 271 N.C. 53, 155 S.E.2d 790 (1967).

Railroad Aid Bonds.—It is essential to the validity of bonds issued in aid of railroads, or other similar enterprises, by counties, townships and other municipal organizations, that the proposition shall have first had the assent of the voters in the territory affected, to be duly ascertained by an election regularly held for that purpose. Lynchburg & Durham R.R. v. Board of Comm'rs, 109 N.C. 159, 13 S.E. 783 (1891).

Auditoriums, Parks, Playgrounds and Recreation Centers.—The acquisition, establishment and operation of an auditorium (G.S. § 160-283), and of playground and recreation centers (G.S. § 160-155 et seq.), are not "necessary expenses" within the meaning of subsection (2) of this section, for which a municipal corporation may borrow money or levy and collect taxes, without an approving vote of the people, but are public purposes for which a municipal corporation may appropriate available surplus funds not derived from taxes

or a pledge of its credit. *City of Greensboro v. Smith*, 241 N.C. 363, 85 S.E.2d 292 (1955); *Keeter v. Town of Lake Lure*, 264 N.C. 252, 141 S.E.2d 634 (1965).

Parks, playgrounds and recreation centers are not necessary municipal expenses within the meaning of subsection (2) of this section of the Constitution; however, funds spent for such projects are for a public purpose. *Horton v. Redevelopment Comm'n*, 262 N.C. 306, 137 S.E.2d 115 (1964).

While parks, playgrounds and recreation centers are for a public purpose, taxes may not be levied therefor without a vote of the people. *Horton v. Redevelopment Comm'n*, 262 N.C. 306, 137 S.E.2d 115 (1964).

Bonds for establishing and maintaining playgrounds, in a populous, industrial city, for its children, are for a necessary expense. *Atkins v. City of Durham*, 210 N.C. 295, 186 S.E. 330 (1936).

Urban Redevelopment Plan.—The expenses incurred, or to be incurred, by a municipality in putting into effect an urban redevelopment plan, pursuant to the authority vested in it by the Urban Redevelopment Law, are not expenses incurred, or to be incurred, by a municipality in the maintenance of public peace or administration of justice, do not partake of a governmental nature, and do not purport to be an exercise by a municipality of a portion of the State's delegated sovereignty, and consequently are not "necessary expenses" within the purview of subsection (2) of this section. *Horton v. Redevelopment Comm'n*, 259 N.C. 605, 131 S.E.2d 464 (1963).

An urban redevelopment plan is not a necessary expense of a municipality within the meaning of subsection (2) of this section, and therefore a municipality may be enjoined from spending ad valorem taxes or levying taxes and issuing bonds for an urban redevelopment project until and unless such project is approved by a majority of the qualified voters of such municipality, and any provisions of G.S. §§ 160-466 (b) and 160-470 authorizing a municipality to levy taxes and issue bonds for such purpose without a vote are unconstitutional. *Horton v. Redevelopment Comm'n*, 259 N.C. 605, 131 S.E.2d 464 (1963).

Any provisions of G.S. §§ 160-466 (b) and 160-470 to the effect that bonds may be sold and issued by a redevelopment commission for the purpose of carrying out the provisions of an urban redevelopment plan or project under the provisions of the

Urban Redevelopment Law, or that any municipality located within the area of such a commission may appropriate funds to a redevelopment commission for the purpose of aiding such a commission in carrying out any of its powers and functions under the Urban Redevelopment Law, and to obtain funds for this purpose, the municipality may levy taxes, and may in the manner prescribed by law issue and sell its bonds, without the approval of a vote of the qualified voters in the municipality, are repugnant to the provisions of subsection (2) of this section. *Horton v. Redevelopment Comm'n*, 259 N.C. 605, 131 S.E.2d 464 (1963).

An urban redevelopment project is not a necessary municipal expense, but expenditures made in furtherance thereof constitute a public purpose. *Horton v. Redevelopment Comm'n*, 262 N.C. 306, 137 S.E.2d 115 (1964).

Improvements within Urban Redevelopment Area.—The fact that a municipality constructs streets, lays water and sewer lines, installs traffic controls and electric facilities within an urban redevelopment area, will not change such construction and installations from a necessary to an unnecessary expense of the municipality. *Horton v. Redevelopment Comm'n*, 262 N.C. 306, 137 S.E.2d 115 (1964).

The establishment of a wharf is not a necessary expense. *Henderson v. City of Wilmington*, 191 N.C. 269, 132 S.E. 25 (1926).

Erection and maintenance of a dispensary is not a necessary expense. *Garsed v. City of Greensboro*, 126 N.C. 159, 35 S.E. 254 (1900).

A municipal platform is not a public market and such platform erected for the purpose of obtaining revenue for the town by the imposition of a fee for the sale of cotton therefrom is not a necessary municipal expense and the town may not issue its notes for the purchase price of such platform without a vote of its electors. *Walker v. Town of Faison*, 202 N.C. 694, 163 S.E. 875 (1932).

The building of a county fence by a county having the free-range law, between it and an adjoining county having the stock law, is not a necessary expense within the meaning of subsection (2) of this section. *Keith v. Lockhart*, 171 N.C. 451, 88 S.E. 640 (1916).

Construction and Maintenance of Municipal Hotel.—The legislature is without power to authorize a municipal corporation to issue its bonds and levy a tax for the payment of the principal and interest on

such indebtedness, in order to enable it to obtain funds for the construction and maintenance of a municipal hotel. *Nash v. Town of Tarboro*, 227 N.C. 283, 42 S.E.2d 209 (1947).

The building of a drilling tower to train the city's firemen is not a necessary expense within the meaning of subsection (2) of this section. *Wilson v. City of Charlotte*, 206 N.C. 856, 175 S.E. 306 (1934).

An expenditure by a municipality for special training of a police officer is a necessary expense within the meaning of subsection (2) of this section. *Green v. Kitchin*, 229 N.C. 450, 50 S.E.2d 545 (1948), discussed in 27 N.C.L. Rev. 500.

The sale of intoxicating liquor is not a "necessary expense," nor is it a public purpose or undertaking. *Newman v. Watkins*, 208 N.C. 675, 182 S.E. 453 (1935).

Advertising.—The expenditure by a municipality of funds for the purpose of advertising the advantages of the city in an effort to secure new industry is not for a necessary municipal expense. *Dennis v. City of Raleigh*, 253 N.C. 400, 116 S.E.2d 923 (1960).

Local bond issue of town of Lake Lure held not to violate subsection (2) of this section. *Keeter v. Town of Lake Lure*, 264 N.C. 252, 141 S.E.2d 634 (1965).

Miscellaneous Applications.—Necessary expenses involve and include the support of the aged and infirm, the laying out and repair of public highways, the construction of bridges, the maintenance of the public peace, and administration of public justice—expenses to enable the county to carry on the work for which it was organized and given a portion of the State's sovereignty. *Horton v. Redevelopment Comm'n*, 259 N.C. 605, 131 S.E.2d 464 (1963).

Bonds issued for the following purposes have been held to have been issued for necessary expenses: For the payment of interest on bonds already issued for necessary purposes (*Wilson v. Board of Aldermen*, 74 N.C. 748 (1876)); the building and maintenance of public roads (*Woodall v. Western Wake Highway Comm'n*, 176 N.C. 377, 97 S.E. 226 (1918); *Lassiter v. Board of Comm'rs*, 188 N.C. 379, 124 S.E. 738 (1924); *Hill v. Board of Comm'rs*, 190 N.C. 123, 129 S.E. 154 (1925); *Ellis v. Greene*, 191 N.C. 761, 133 S.E. 395 (1926)); paving streets (*Town of Hendersonville v. Jordan*, 150 N.C. 35, 63 S.E. 167 (1908); *Brown v. Town of Hillsboro*, 185 N.C. 368, 117 S.E. 41 (1923)); lighting streets (*Ellison v. Town of Williamston*, 152 N.C.

147, 67 S.E. 255 (1910)) to the extent of furnishing a plant for that purpose (*Fawcett v. Town of Mt. Airy*, 134 N.C. 125, 45 S.E. 1029 (1903); *Swindell v. Town of Belhaven*, 173 N.C. 1, 91 S.E. 369 (1917)); furnishing sidewalks (*Storm v. Town of Wrightsville Beach*, 189 N.C. 679, 128 S.E. 17 (1925)); building bridges (*Herring v. Dixon*, 122 N.C. 420, 29 S.E. 368 (1898); *Norfolk S.R.R. v. Reid*, 187 N.C. 320, 121 S.E. 534 (1924)) even though the bridge is interstate (*Emery v. Commissioners of Mecklenburg County*, 181 N.C. 420, 107 S.E. 443 (1921)); furnishing waterworks and sewerage systems (*Brockenbrough v. Board of Water Comm'rs*, 134 N.C. 1, 46 S.E. 28 (1903); *Greensboro v. Scott*, 138 N.C. 181, 50 S.E. 589 (1905); *Underwood v. Town of Asheboro*, 152 N.C. 641, 68 S.E. 147 (1910); *Reed v. Howerton Eng'r Co.*, 188 N.C. 39, 123 S.E. 479 (1924)); erection of a courthouse (*Halcomb v. Commissioners of Haywood*, 89 N.C. 346 (1883)); erection of a municipal building in a large city (*Hightower v. City of Raleigh*, 150 N.C. 569, 65 S.E. 279 (1909)); and the building of county homes (*Norfolk S.R.R. v. Reid*, 187 N.C. 320, 121 S.E. 534 (1924)). See *Board of Financial Control v. County of Henderson*, 208 N.C. 569, 181 S.E. 636, 101 A.L.R. 783 (1935), as to municipal electric plant being a necessary expense.

The sale of refunding bonds under G.S. § 153-77, subdivision (9), is a necessary expense. *Morrow v. Durham*, 210 N.C. 564, 187 S.E. 752 (1936). So also is the issuance of bonds by a county to refinance highway bonds issued by its townships. *Thomson v. Harnett County*, 209 N.C. 662, 184 S.E. 490 (1936). The expense of providing for the medical treatment and hospital care of the indigent sick and afflicted poor under G.S. § 160-229 is a necessary expense of a city. *Martin v. City of Raleigh*, 208 N.C. 369, 180 S.E. 786 (1935). See also *Martin v. Board of Comm'rs*, 208 N.C. 354, 180 S.E. 777 (1935).

Other projects which have sustained the issuance of bonds as necessary expenses, though of less frequent occurrence than those just enumerated, are: for the installation of an electric fire-alarm system (*City of Kinston v. Security Trust Co.*, 169 N.C. 207, 85 S.E. 399 (1915)); purchase of an incinerator for the destruction of garbage (*Storm v. Town of Wrightsville Beach*, 189 N.C. 679, 128 S.E. 17 (1925)); erection of an abattoir (*Moore v. City of Greensboro*, 191 N.C. 592, 132 S.E. 565 (1926)); and of jetties (*Storm v. Town of Wrights-*

ville Beach, 189 N.C. 679, 128 S.E. 17 (1925)).

For other expenses approved as "necessary" within the purview of this section, see *Horton v. Redevelopment Comm'n*, 259 N.C. 605, 131 S.E.2d 464 (1963).

For other expenses held not "necessary" within the purview of subsection (2) of this section, see *Horton v. Redevelopment Comm'n*, 259 N.C. 605, 131 S.E.2d 464 (1963); *Cole v. City of Asheville*, 2 N.C. App. 652, 163 S.E.2d 628 (1968).

C. Operation and Maintenance of Schools.

Subsection (2) of this section applies to local matters relating to the affairs of the county separately considered, and not to a statewide system of education, in which the counties are acting as governmental agencies for the carrying out of the entire scheme, made mandatory by Art. IX of the Constitution. *Owens v. Wake County*, 195 N.C. 132, 141 S.E. 546 (1928).

And Does Not Extend to Statewide Measures.—The restrictions contained in subsection (2) of this section must be understood to refer to debts in furtherance of local measures and do not extend to a statewide measure undertaken in obedience to a separate provision of the Constitution, and in which the counties are expressly recognized as the governmental units through which the general purpose may be made effective. *Lacy v. Fidelity Bank*, 183 N.C. 373, 111 S.E. 612 (1922).

Thus It Does Not Apply to Indebtedness Incurred in Carrying on Public School System of State.—Where indebtedness is incurred by legislative authority in carrying on the public school system of the State as required by Art. IX of the Constitution, it has been held that the question of taxation for this purpose need not be submitted to the voters. *Tate v. Board of Educ.*, 192 N.C. 516, 135 S.E. 336 (1926); *Hartsfield v. Craven County*, 194 N.C. 358, 139 S.E. 698 (1927).

Maintenance of the public schools and the furnishing of those things which are reasonably essential to that end are within the mandatory provision of N.C. Const., Art. IX, unaffected by the "necessary expense" provision contained in subsection (2) of this section. *Harris v. Board of Comm'rs*, 1 N.C. App. 258, 161 S.E.2d 213 (1968).

Where Bonds or Notes Are Issued under Authority of County Finance Act.—The limitations of subsection (2) of this section are not applicable to bonds or notes

issued by a county, as an administrative agency of the State, under authority conferred by the County Finance Act (G.S. § 153-77), for the purpose of erecting schoolhouses, and equipping same, or purchasing land necessary for school purposes. *Hall v. Commissioners of Duplin County*, 194 N.C. 768, 140 S.E. 739 (1927).

School Districts as Municipal Corporations.—School districts are public quasi-corporations, included in the term municipal corporations as used in subsection (2) of this section. *Smith v. School Trustees*, 141 N.C. 143, 53 S.E. 524 (1906).

A legally qualified board of trustees of the graded schools of a town is a municipal corporation within the meaning and purport of subsection (2) of this section. *Hollowell v. Borden*, 148 N.C. 255, 61 S.E. 638 (1908).

Operation of Public Schools Is "Necessary Expense".—The operation of the public schools as required by Art. IX of the Constitution is a "necessary expense" not requiring a vote of the electorate. *Yoder v. Board of Comm'rs*, 7 N.C. App. 712, 173 S.E.2d 529 (1970).

Operation of the public school system has been held to be a necessary expense, not requiring a vote of the people. *Benvenue Parent-Teacher Ass'n v. Nash County Bd. of Educ.*, 4 N.C. App. 617, 167 S.E.2d 538 (1969).

Liability for bonds for unnecessary school buildings is not a necessary expense. *City of Greensboro v. Guilford County*, 209 N.C. 655, 184 S.E. 473 (1936).

The power is not given the county to issue bonds for the erection and purchase of schoolhouses without a popular vote except where such schoolhouses and necessary land therefor are required for the establishment and maintenance of a school term as provided by the Constitution. *Lovell v. Pratt*, 187 N.C. 686, 122 S.E. 661 (1924); *Frazier v. Board of Comm'rs*, 194 N.C. 49, 138 S.E. 433 (1927); *Owens v. Wake County*, 195 N.C. 132, 141 S.E. 546 (1928); *Hall v. Commissioners of Duplin*, 195 N.C. 367, 142 S.E. 315 (1928).

Expenditure of funds by county for operation of a technical institute for adult vocational and general educational training without a vote of the people does not violate subsection (2) of this section, since in expending such funds the county acts as an agency of the State in carrying out the mandate of N.C. Const., Art. IX, § 2, requiring the General Assembly to provide for a general and uniform system of public instruction. *Benvenue Parent-Teacher*

Ass'n v. Nash County Bd. of Educ., 4 N.C. App. 617, 167 S.E.2d 538 (1969).

Premiums for insurance of its public school buildings are a necessary public expense of a county. *Fuller v. Lockhart*, 209 N.C. 61, 182 S.E. 733 (1935).

Payment of Judgments for Salaries Owed to School Employees.—Borrowing money to pay judgments for salaries owing to the employees of a city school in anticipation of collection of taxes levied thereon is not in contravention of subsection (2) of this section. *Hammond v. City of Charlotte*, 206 N.C. 604, 175 S.E. 148 (1934).

Athletic Stadium.—As to school district bonds or taxes for athletic stadium, see *Boney v. Board of Trustees*, 229 N.C. 136, 48 S.E.2d 56 (1948).

Sec. 5. *Acts levying taxes to state objects.* Every act of the General Assembly levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other purpose.

Editor's Note.—The provisions of this section are similar to those of Art. V, § 7, Const. 1868, and the cases in the following annotation were decided under that section.

Section Does Not Apply to Levy by Counties or Towns for General Purposes.—The provisions of this section do not extend to taxes levied by counties or incorporated cities or towns for general municipal purposes. *Cabe v. Board of Aldermen*, 185 N.C. 158, 116 S.E. 419 (1923).

This section has no application to taxes levied by the county authorities for county purposes. *Parker v. Board of Comm'rs*, 104 N.C. 166, 10 S.E. 137 (1889).

Act Providing for Levy to Pay County Bonds.—Where an act authorizes the levy and collection of a special tax for the payment of certain county bonds; and a later act directed that the special tax collected under the first act should be turned into

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As to application of subsection (3) of this section, see *Leak v. Commissioners of Richmond County*, 64 N.C. 133 (1870); *Poindexter v. Davis*, 67 N.C. 112 (1872); *Weith v. City of Wilmington*, 68 N.C. 24 (1873); *Logan v. Plummer*, 70 N.C. 388 (1874); *Davis v. Board of Comm'rs*, 72 N.C. 441 (1875); *Brickell v. Commissioners of Halifax*, 81 N.C. 240 (1879); *Wingate v. Parker*, 136 N.C. 369, 48 S.E. 774 (1904); *Jones v. Commissioners*, 137 N.C. 579, 50 S.E. 291 (1905); *Smith v. School Trustees*, 141 N.C. 143, 53 S.E. 524 (1906); *Southern Ry. v. Board of Comm'rs*, 148 N.C. 220, 61 S.E. 690 (1908); *Board of Trustees v. Webb*, 155 N.C. 379, 71 S.E. 520 (1911).

the general county fund, the first act is in conflict with this section which provides that every act of the General Assembly levying a tax shall state the special object to which it is to be applied. *McCless v. Meekins*, 117 N.C. 34, 23 S.E. 99 (1895).

Statute Authorizing County to Impose Tax.—Where the statute authorizes a county to impose a tax for necessary expenses, it is a delegation of the power to be exercised by the county as an agency for the State for the convenience of local administration, and the statute is not void in failing to state the special object to which it is to be applied, nor is the tax itself invalid if this constitutional requirement has been observed by the county authority in the imposition of the special tax. *Norfolk S.R.R. v. Reid*, 187 N.C. 320, 121 S.E. 534 (1924).

Sec. 6. *Invulnerability of sinking funds and retirement funds.*

(1) *Sinking funds.* The General Assembly shall not use or authorize to be used any part of the amount of any sinking fund for any purpose other than the retirement of the bonds for which the sinking fund has been created.

(2) *Retirement funds.* Neither the General Assembly nor any public officer, employee, or agency shall use or authorize to be used any part of the funds of the Teachers' and State Employees' Retirement System for any purpose other than retirement system benefits and purposes, administrative expenses, and refunds; except that retirement system funds may be invested as authorized by law, subject to the investment limitation that the funds of the Teachers' and State Employees' Retirement System shall not be applied, diverted, loaned to, or used by the State, any State agency, State officer, public officer, or public employee.

Editor's Note.—The provisions of subsection (1) of this section are similar to those of Art. II, § 30, Const. 1868, as

adopted in 1924, and the provisions of subsection (2) are similar to those of Art. II, § 31, Const. 1868, as adopted in 1950. The

cases in the following annotation were decided under Art. II, § 30, Const. 1868.

Sum Erroneously Placed in Sinking Fund.—While sinking funds provided for the retirement of municipal bonds may not be diverted from that purpose to other municipal requirements by a city, a sum erroneously placed on the books of the city in a sinking fund by a clerk without authorization, which sum was actually derived from profits from the municipal electric plant, does not fall within the constitutional or statutory inhibitions, and the

city may by ordinance correct the error of the clerk and use the funds for other lawful municipal purposes. *Mewborn v. City of Kinston*, 199 N.C. 72, 154 S.E. 76 (1930).

Expenditure of Surplus Unencumbered Funds.—Although the General Assembly cannot authorize a diversion of a county's sinking funds which are necessary to pay outstanding sinking fund bonds, it can direct the expenditure of surplus unencumbered sinking funds, provided the expenditure is for a public purpose. *Johnson v. Marrow*, 228 N.C. 58, 44 S.E.2d 468 (1947).

Sec. 7. *Drawing public money.*

(1) *State treasury.* No money shall be drawn from the State treasury but in consequence of appropriations made by law, and an accurate account of the receipts and expenditures of State funds shall be annually published.

(2) *Local government treasuries.* No money shall be drawn from the treasury of any county, city or town, or other unit of local government except by authority of law.

Editor's Note.—The provisions of subsection (1) of this section are similar to those of Art. XIV, § 3, Const. 1868. The provisions of subsection (2) are similar to those of Art. VII, § 7, Const. 1868, as amended in 1962. The cases in the following annotation were decided under Art. XIV, § 3, Const. 1868.

Opinions of Attorney General.—Mr. Francis M. Coiner, Hendersonville City Attorney, 8/13/69.

Legislative Authority Required.—Subsection (1) of this section means that there must be legislative authority in order for money to be validly drawn from the treasury. In other words, the legislative power is supreme over the public purse. *White v. Hill*, 125 N.C. 194, 34 S.E. 432 (1899), citing *Garner v. Worth*, 122 N.C. 250, 29 S.E. 364 (1898).

Moneys paid into the hands of the State Treasurer by virtue of a State law become public funds for which the Treasurer is responsible and may be disbursed only in accordance with legislative authority. *Gardner v. Board of Trustees*, 226 N.C. 465, 38 S.E.2d 314 (1946); *State v. Davis*, 270 N.C. 1, 153 S.E.2d 749 (1967).

Subsection (1) of this section states in language no man can misunderstand that

the legislative power is supreme over the public purse. *State v. Davis*, 270 N.C. 1, 153 S.E.2d 749 (1967).

Subsection (1) as Bar to Judicial Action.—Subsection (1) of this section effectually bars any judicial action to enforce collection of liabilities against the State, and the courts cannot direct the State Treasurer to pay such claims, however just and unquestioned, when there is no legislative appropriation to pay the same. *Garner v. Worth*, 122 N.C. 250, 29 S.E. 364 (1898).

When Mandamus Will Lie.—It is only when the legislative department has appropriated a certain fund to the payment of a liability incurred or to be incurred and the Auditor or Treasurer refuses to obey the legislative mandate that the court can issue its mandamus to compel him to do so. *Garner v. Worth*, 122 N.C. 250, 29 S.E. 364 (1898).

The State Treasurer may refuse to pay a warrant of the Auditor if it appear that the law under which it is issued is unconstitutional or the claim is not within the terms of the statute under which it is brought. *Martin v. Clark*, 135 N.C. 178, 47 S.E. 397 (1904).

Suit against County, City or Town.—See G.S. § 153-64 and the note thereto.

ARTICLE VI

SUFFRAGE AND ELIGIBILITY TO OFFICE

Section 1. *Who may vote.* Every person born in the United States and every person who has been naturalized, 21 years of age, and possessing the qualifications set out in this Article, shall be entitled to vote at any election by the people of the State, except as herein otherwise provided.

Cross References.—See note to § 2 of this article. For statutory provisions regarding elections and the qualifications of voters therein, see G.S. § 163-1 et seq.

Editor's Note.—The provisions of this section are similar to those of Art. VI, § 1, Const. 1868, as that article was rewritten in 1900 and as amended in 1946.

History of Article. — See Lassiter v.

Northampton County Bd. of Elections, 248 N.C. 102, 102 S.E.2d 853 (1958), aff'd, 360 U.S. 45, 79 S. Ct. 985, 3 L. Ed. 2d 1072 (1959).

Sec. 2. *Qualifications of voter.*

(1) *Residence period for State elections.* Any person who has resided in the State of North Carolina for one year and in the precinct, ward, or other election district for 30 days next preceding an election, and possesses the other qualifications set out in this Article, shall be entitled to vote at any election held in this State. Removal from one precinct, ward, or other election district to another in this State shall not operate to deprive any person of the right to vote in the precinct, ward, or other election district from which that person has removed until 30 days after the removal.

(2) *Residence period for presidential elections.* The General Assembly may reduce the time of residence for persons voting in presidential elections. A person made eligible by reason of a reduction in time of residence shall possess the other qualifications set out in this Article, shall only be entitled to vote for President and Vice President of the United States or for electors for President and Vice President, and shall not thereby become eligible to hold office in this State.

(3) *Disqualification of felon.* No person adjudged guilty of a felony against this State or the United States, or adjudged guilty of a felony in another state that also would be a felony if it had been committed in this State, shall be permitted to vote unless that person shall be first restored to the rights of citizenship in the manner prescribed by law.

Editor's Note.—The provisions of this section are similar to those of Art. VI, § 2, Const. 1868, as added in 1900 and amended in 1920, 1954 and 1962, and the cases in the following annotation were decided under that section.

For note on inadequacy of prisoners' rights to provide sufficient protection for those confined in penal institutions, see 48 N.C.L. Rev. 847 (1970).

"Residence" Defined. — Residence, as used in this section defining political rights, is synonymous with domicile, denoting a permanent dwelling place, to which the party, when absent, intends to return. State ex rel. Hannon v. Grizzard, 89 N.C. 115 (1883); State ex rel. Owens v. Chaplin, 228 N.C. 705, 47 S.E.2d 12 (1948); Baker v. Varner, 240 N.C. 260, 82 S.E.2d 90 (1954).

A person, in order to become a qualified elector in this State, must have come into the State a year before the election, or have been domiciled within it for twelve months after forming the purpose to remain, and the same intent must be concurrent with the actual occupation of a domicile in the county in order to entitle him to the rights of an elector within its limits. People ex rel. Boyer v. Teague, 106 N.C. 576, 11 S.E. 665 (1890).

In order to acquire a residence for the purpose of exercising the right to vote in a given locality, the "residence" must be of a permanent, and not of a temporary char-

acter, corresponding with the word domicile. State ex rel. Gower v. Carter, 195 N.C. 697, 143 S.E. 513 (1928).

General Assembly Cannot Increase Length of Residence.—The General Assembly cannot in any way change the qualifications of voters in State, county, township, city or town elections; an act which requires a longer residence in the county than this section requires is unconstitutional. People ex rel. Van Bokkelen v. Canaday, 73 N.C. 198 (1875).

Qualifications Same for Municipal Election. — The qualifications of voters in a municipal election are the same as in a general one. State ex rel. Gower v. Carter, 194 N.C. 293, 139 S.E. 604 (1927).

Cities and towns, like counties and townships, are parts and parcels of the State, organized for the convenience of local self-government; and the qualifications of voters are the same. People ex rel. Van Bokkelen v. Canaday, 73 N.C. 198 (1875).

A provision in the charter of a municipality limiting the right of suffrage in municipal elections to owners of real property within the town is unconstitutional. Smith v. Town of Carolina Beach, 206 N.C. 834, 175 S.E. 313 (1934).

A provision in a town charter permitting nonresident freeholders to vote in all municipal elections is void because in conflict with this section. However, an election held under this provision is not void

if it is shown that no persons not qualified under the Constitution actually participated in the election. *Wrenn v. Town of Kure Beach*, 235 N.C. 292, 69 S.E.2d 492 (1952).

This constitutional provision applies primarily to an incoming person, who is not permitted to exercise political rights until after he has been in the State and the voting precinct for the prescribed periods. *State ex rel. Owens v. Chaplin*, 228 N.C. 705, 47 S.E.2d 12 (1948).

And Not to a Citizen Temporarily Absent.—This constitutional provision is not designed to disfranchise a citizen of the State when he leaves his home and goes into another state or into another county of this State for temporary purposes with the intention of retaining his home and of returning to it when the objects which call him away are attained. *State ex rel. Owens v. Chaplin*, 228 N.C. 705, 47 S.E.2d 12 (1948).

Where a voter was in the service of the federal government at Washington, D.C., but continued to pay poll tax and vote in Halifax County, and spent a part of each year at his home in Halifax, his constitutional residence remained unchanged in Halifax. *Baker v. Varser*, 240 N.C. 260, 82 S.E.2d 90 (1954).

Protracted Residence Abroad. — A protracted residence abroad of one engaged in business and with no home in this State, is not consistent with the idea of a residence here. *State ex rel. Hannon v. Grizzard*, 89 N.C. 115 (1883).

Where Voter Resides Near Precinct Line.—When a voter resides on or so near the precinct line, or the line be so uncertain, that it is doubtful in which precinct the voter lives, and the voter, honestly and

in good faith, bona fide, registers and votes in the precinct he, in good faith, alleges and believes he lives in, and has good reason to believe he is correct, and registers and votes in no other precinct, such vote is legal. *People ex rel. Boyer v. Teague*, 106 N.C. 576, 11 S.E. 665 (1890).

Failure to Administer Oath to Electors.—The mere failure of the registrars to administer the oath to the electors, and allowing them to vote where not challenged, will not affect the result of the election held for the establishment of a special road district under valid legislative authority, when the electors so voting are qualified. *Woodall v. Western Wake Highway Comm'n*, 176 N.C. 377, 97 S.E. 226 (1918).

Conviction of Crime. — In a contested election case, a conviction of an offense under a local law prescribing punishment in the State's prison renders void the vote of the one so convicted, whether the indictment charged or failed to charge that the alleged offense was "feloniously" committed. *State ex rel. Robertson v. Jackson*, 183 N.C. 695, 110 S.E. 593 (1922).

Vote of Escaped Prisoner.—If a person in jail for misdemeanor (not infamous), and sentenced to imprisonment, escapes, and, before he is recaptured, his term or sentence expires, and he votes in his own precinct, in which he resided before he was sentenced, such vote is valid if the voter be otherwise qualified; but, if the voter is a fugitive from justice, and hiding from one part of the county to another, and voted in the precinct he happened to be in, and not in the precinct of his residence when sentenced, such vote is illegal. *People ex rel. Boyer v. Teague*, 106 N.C. 576, 11 S.E. 665 (1890).

Sec. 3. Registration. Every person offering to vote shall be at the time legally registered as a voter as herein prescribed and in the manner provided by law. The General Assembly shall enact general laws governing the registration of voters.

Cross Reference. — For statutory provisions as to registration, see G.S. § 163-65 et seq.

Editor's Note.—The provisions of this section are similar to those of Art. VI, § 3, Const. 1868, as the article was rewritten in 1900, and the cases in the following annotation were decided under that section, and under Art. VI, § 4, Const. 1868, as amended.

Registration Is Essential.—Registration is essential to the exercise by a citizen, possessed of the other legal qualifications, of his right to vote, and, when duly made, is prima facie evidence of the right. *State*

ex rel. Hampton v. Waldrop, 104 N.C. 453, 10 S.E. 694 (1889).

And Entitles Elector to Vote.—The registration of an elector, who is qualified to vote, must be accepted as the act of a public officer, and entitles the elector to cast his vote. *State ex rel. DeBerry v. Nicholson*, 102 N.C. 465, 9 S.E. 545 (1889).

When Voter Prevented from Registering by Wrongful Act of Registrars.—Where a voter offers to comply with the laws in reference to registration, but is prevented by the wrongful conduct of the registrar, his vote should be received and counted, but a vote cast upon an invalid registration

should be rejected. *State ex rel. Harris v. Scarborough*, 110 N.C. 232, 14 S.E. 737 (1892).

When There Has Been No Registration at All.—Where there has been no registration at all, the votes cast cannot be counted by proving that none but duly qualified electors voted; possibly this principle might be relaxed where a fraudulent conspiracy to deprive the voters of the right of suffrage is shown; and it does not apply where the legislature has failed to provide means for registration. *State ex rel. Harris v. Scarborough*, 110 N.C. 232, 14 S.E. 737 (1892).

Registration Book Lost.—Where the registration book of an election precinct had been lost, and could not be replaced, but the registrar procured a new book, in which he entered the names of such persons as he knew had theretofore been registered, and also the names of those who applied for registration subsequently and it appeared that, at the election following, no one voted whose name did not appear on the registration book, that no one voted who was not entitled to vote, and no one who was entitled to vote was excluded, the election was valid. *State ex rel. Hampton v. Waldrop*, 104 N.C. 453, 10 S.E. 694 (1889).

Sec. 4. Qualification for registration. Every person presenting himself for registration shall be able to read and write any section of the Constitution in the English language.

Editor's Note.—The provisions of this section are similar to those of the first sentence of Art. VI, § 4, Const. 1868, as added in 1900 and amended in 1920, and the cases in the following annotation were decided under that section.

Defeat of Proposed Amendment.—Session Laws 1969, c. 1004, s. 1, proposed to strike from this article all of § 4, and to renumber §§ 5 through 10 as §§ 4 through 9. The amendment failed of adoption at the general election held Nov. 3, 1970.

The language of this section is mandatory. *Allison v. Sharp*, 209 N.C. 477, 184 S.E. 27 (1936).

Validity of Literacy Requirement.—The provision of former G.S. § 163-28 (see now G.S. § 163-58) requiring all persons applying for registration to be able to read and write any section of the Constitution as an educational qualification to the right to vote is authorized by this article, and, since it applies alike to all persons who present themselves for registration to vote, it makes no discrimination based on race, creed or color, and therefore does not conflict with the Fourteenth, Fifteenth or Seventeenth Amendments to the Constitution of the United States. *Lassiter v.*

Power of General Assembly to Enact Registration Laws.—While the General Assembly cannot add to the qualifications prescribed by the Constitution for voters, it has the power and the duty to enact such registration laws as will protect the rights of duly qualified voters, and no person is entitled to vote until he has complied with the requirements of those laws. *State ex rel. Harris v. Scarborough*, 110 N.C. 232, 14 S.E. 737 (1892).

Act Requiring New Registration.—An act authorizing a bond issue by a county is not objectionable as violating this section, upon the ground that it empowered the county commissioners to order a new registration. *Cox v. Commissioners of Pitt County*, 146 N.C. 584, 60 S.E. 516 (1908).

Act Requiring Proof of Ability to Read and Write.—The provisions of former G.S. § 163-28 (see now G.S. § 163-58) providing that a person presenting himself for registration shall, before he is registered, prove to the satisfaction of the registrar his ability to read and write any section of the Constitution, was held valid, since the authority was granted the legislature by this section to enact general legislation to carry out the provisions of this article. *Allison v. Sharp*, 209 N.C. 477, 184 S.E. 27 (1936).

Northampton County Bd. of Elections, 248 N.C. 102, 102 S.E.2d 853 (1958), aff'd, 360 U.S. 45, 79 S. Ct. 985, 3 L. Ed. 2d 1072 (1959).

In an action brought under § 4 (a) of the federal Voting Rights Act of 1965, it is appropriate for a court to consider whether a literacy or educational requirement has the effect of denying . . . the right to vote on account of race or color because the state or subdivision which seeks to impose the requirement has maintained separate and inferior schools for its negro residents who are now of voting age. *Gaston County v. United States*, 395 U.S. 285, 89 S. Ct. 1720, 23 L. Ed. 2d 309 (1969).

Use of the literacy test as a prerequisite to registering to vote has the effect of denying or abridging the right to vote on account of race or color where it places an onerous burden on the negroes for whom a county has maintained separate and inferior schools. *Gaston County v. United States*, 395 U.S. 285, 89 S. Ct. 1720, 23 L. Ed. 2d 309 (1969).

Statute Putting Duty on Registrar to Determine Literacy.—As this section says "presenting himself for registration," some-

one has to determine whether or not the person is able to read and write any section of the Constitution in the English language. Former G.S. § 163-28, putting this duty on the registrar, was a reasonable pro-

vision, and the registrar is the logical person to carry out the provisions of the Constitution. *Allison v. Sharp*, 209 N.C. 477, 184 S.E. 27 (1936).

Sec. 5. Elections by people and General Assembly. All elections by the people shall be by ballot, and all elections by the General Assembly shall be *viva voce*. A contested election for any office established by Article III of this constitution shall be determined by joint ballot of both houses of the General Assembly in the manner prescribed by law.

Editor's Note.—The provisions of the first sentence of this section are similar to those of Art. II, § 9, Const. 1868, and Art. VI, § 6, Const. 1868, as Art. VI was rewritten in 1900. The provisions of the second sentence of this section are similar to those of the second sentence of Art. III, § 3, Const. 1868, as amended in 1926. The cases in the following annotation were decided under Art. II, § 9, and Art. VI, § 6, Const. 1868.

How Elector May Deposit Ballot.—The provisions of this section give the elector the choice to deposit his own ballot secretly, or to declare his choice openly when depositing it, or to have the registrar, or one of the judges of election, deposit it for him. *Jenkins v. State Bd. of Elections*, 180 N.C. 169, 104 S.E. 346 (1920).

Secrecy of Ballot. — The provisions of this section imply that in elections by the people the ballot shall be a secret one.

Sec. 6. Eligibility to elective office. Every qualified voter in North Carolina, except as in this Constitution disqualified, shall be eligible for election by the people to office.

Editor's Note.—The provisions of this section are similar to those of the first clause of Art. VI, § 7, Const. 1868, as that article was rewritten in 1900, and the cases in the following annotation were decided under that section.

Legislature Cannot Increase Qualifications.—The legislature cannot add to the constitutional disqualifications to hold office by requiring candidates for the position of recorder in a municipal court to be "a licensed attorney at law." *State ex rel. Spruill v. Bateman*, 162 N.C. 588, 77 S.E. 768 (1913).

Sec. 7. Oath. Before entering upon the duties of an office, a person elected or appointed to the office shall take and subscribe the following oath:

"I,, do solemnly swear (or affirm) that I will support and maintain the Constitution and laws of the United States, and the Constitution and laws of North Carolina not inconsistent therewith, and that I will faithfully discharge the duties of my office as, so help me God."

Editor's Note.—The provisions of this section are similar to those of Art. VI, §

Withers v. Board of County Comm'rs, 196 N.C. 535, 146 S.E. 225 (1929).

It is not necessary to show undue influence or intimidation for the courts to declare an election void when the voters have been deprived of their right to a secret ballot. *Withers v. Board of County Comm'rs*, 196 N.C. 535, 146 S.E. 225 (1929).

A voter at an election does not waive his constitutional right to a secret ballot by not protesting, unless he has been made aware of his rights under the facts and circumstances of the balloting. *Withers v. Board of County Comm'rs*, 196 N.C. 535, 146 S.E. 225 (1929).

Presumption of Regularity of Legislative Election.—Where a certificate shows that there was a legislative election of an officer and nothing else appearing, the law presumes a quorum and that the election was regular. *State ex rel. Cherry v. Burns*, 124 N.C. 761, 33 S.E. 136 (1899).

Women as Public Officers.—A woman is qualified to act as a notary public since the adoption of the Nineteenth Amendment to the Constitution of the United States, and also to pass upon the proper probate of a deed to lands, and make a valid certificate for its registration, when thereto deputized by the clerk of the superior court. *Preston v. Roberts*, 183 N.C. 62, 110 S.E. 586 (1922). For the former rule, see *State ex rel. Attorney-General v. Knight*, 169 N.C. 333, 85 S.E. 418 (1915).

7, Const. 1868, as that article was rewritten in 1900.

Sec. 8. *Disqualifications for office.* The following persons shall be disqualified for office:

First, any person who shall deny the being of Almighty God.

Second, with respect to any office that is filled by election by the people, any person who is not qualified to vote in an election for that office.

Third, any person who has been adjudged guilty of treason or any other felony against this State or the United States, or any person who has been adjudged guilty of a felony in another state that also would be a felony if it had been committed in this State, or any person who has been adjudged guilty of corruption or malpractice in any office, or any person who has been removed by impeachment from any office, and who has not been restored to the rights of citizenship in the manner prescribed by law.

Editor's Note.—The provisions of this section are similar to those of Art. VI, § 8, Const. 1868, as that article was rewritten in 1900, and the cases in the following annotation were decided under that section.

Disqualification Not Part of Judgment.—The disqualification for office and the loss of the right of suffrage imposed by this section upon persons convicted of infamous offenses constitute no part of the judgment of the court, but are mere consequences of such judgment. *State v. Jones*, 82 N.C. 685 (1880).

Removal of Prosecuting Attorney.—A prosecuting attorney is removable from of-

fice as a matter of law or legal inference upon findings of his wilful misconduct or maladministration in office, supported by evidence. *State ex rel. Hyatt v. Hamme*, 180 N.C. 684, 104 S.E. 174 (1920).

Appeal from Judgment That Prosecuting Attorney Be Removed.—An appeal from the judgment of the superior court judge that a prosecuting attorney be removed for "wilful misconduct or maladministration in office," etc., is upon questions of law and legal inference, if justified by the findings of facts supported by evidence. *State ex rel. Hyatt v. Hamme*, 180 N.C. 684, 104 S.E. 174 (1920).

Sec. 9. *Dual office holding.*

(1) *Prohibitions.* It is salutary that the responsibilities of self-government be widely shared among the citizens of the State and that the potential abuse of authority inherent in the holding of multiple offices by an individual be avoided. Therefore, no person who holds any office or place of trust or profit under the United States or any department thereof, or under any other state or government, shall be eligible to hold any office in this State that is filled by election by the people. No person shall hold concurrently any two offices in this State that are filled by election of the people. No person shall hold concurrently any two or more appointive offices or places of trust or profit, or any combination of elective and appointive offices or places of trust or profit, except as the General Assembly shall provide by general law.

(2) *Exceptions.* The provisions of this Section shall not prohibit any officer of the military forces of the State or of the United States not on active duty for an extensive period of time, any notary public, or any delegate to a Convention of the People from holding concurrently another office or place of trust or profit under this State or the United States or any department thereof.

Cross References.—As to what constitutes a public office, and numerous illustrations thereof, see note to G.S. § 1-515. As to the form and nature of the action to declare an office vacant, see § 1-515 et seq. and the notes thereto.

Editor's Note.—The provisions of this section are similar to those of Art. XIV, § 7, Const. 1868, as amended in 1872-73, 1944 and 1962, and the cases in the following annotation were decided under that section.

Opinions of Attorney General.—Mr. F.P. Bodenheimer, Jr., 8/11/69; Mr. Tom Hen-

son, Macon County Tax Supervisor, 10/23/69; Mr. E. Bruce Beasley, II, Mid-East Economic Development Commission, 11/12/69; Mr. Cecil J. Spears, Member, Board of Enfield Town Commissioners, 11/20/69.

Watershed Improvement Commission.—See opinion of Attorney General to Mr. Wm. Clarence Kluttz, Rowan County Attorney, 1/21/70.

Purpose.—The manifest intent is to prevent double office holding—that offices and places of public trust should not accumulate in any single person—and the super-

added words of "places of trust or profit" were put there to avoid evasion in giving too technical a meaning to the preceding words. *Doyle v. Aldermen of Raleigh*, 89 N.C. 133 (1883), approved, *Groves v. Barden*, 169 N.C. 8, 84 S.E. 1042 (1915).

This section was never intended to discourage public officials from assuming military leadership in time of emergency. *In re Yelton*, 223 N.C. 845, 28 S.E.2d 567 (1944).

Under this section, which is intended and designed to prevent or inhibit double office holding, except in certain instances, it is not permissible for one person to hold two offices at the same time. *In re Yelton*, 223 N.C. 845, 28 S.E.2d 567 (1944); *In re Advisory Opinion*, 226 N.C. 772, 39 S.E.2d 217 (1946).

Definition of Public Office. — An office is a public station, or employment, conferred by appointment of government and the term embraces the idea of tenure, duration, emolument, and duties. *In re Advisory Opinion*, 226 N.C. 772, 39 S.E.2d 217 (1946).

Where the office which a judge proposed to accept carried with it some of the attributes of sovereignty, and perforce invested him with governmental authority, he would be holding an office or place of trust or profit under the United States, or a department thereof, within the meaning of this section. *In re Advisory Opinion*, 226 N.C. 772, 39 S.E.2d 217 (1946).

Effect of Acceptance of Second Office. — Where one holding an "office or place of profit" accepts another such office or position in contravention of this section of the Constitution, the first is vacated *eo instanti*, and any further acts done by him in connection with the first office are without color, and cannot be *de facto*. *Whitehead v. Pittman*, 165 N.C. 89, 80 S.E. 976 (1914).

The acceptance of a second office, which is forbidden or incompatible with the office already held, operates *ipso facto* to vacate the first. *In re Yelton*, 223 N.C. 845, 28 S.E.2d 567 (1944); *In re Advisory Opinion*, 226 N.C. 772, 39 S.E.2d 217 (1946).

In State ex rel. Barnhill v. Thompson, 122 N.C. 493, 29 S.E. 720 (1898), it is said: "The acceptance of a second office by holding a public office operates *ipso facto* to vacate the first. While the officer has a right to elect which he will retain, his election is deemed to have been made when he accepts and qualifies for the second." The acceptance of the second office is of itself a resignation of the first. *Whitehead v. Pittman*, 165 N.C. 89, 80 S.E. 976 (1914).

Where a man accepts an office under the State, he vacates another held under the same sovereignty. *State v. Cook*, 273 N.C. 377, 160 S.E.2d 49 (1968).

Where the clerk of a county recorder's court accepted the office of justice of the peace without surrendering the first office, he automatically and instantly vacated the first office, and he did not thereafter act as either a *de jure* or a *de facto* officer in performing functions of the first office, because he had neither right nor color of right to it. *State v. Cook*, 273 N.C. 377, 160 S.E.2d 49 (1968).

The jurisdiction of a judge of a municipal recorder's court to impose sentence cannot be successfully attacked on the ground that at the time the recorder was appointed he was mayor of the municipality and therefore held two offices in contravention of this section, since even if it be granted that the statute permitting a mayor to be appointed recorder confers upon the mayor when chosen recorder other than *ex officio* duties, the acceptance of the office of recorder would vacate the office of mayor, but would not affect the office of recorder. *In re Barnes*, 212 N.C. 735, 194 S.E. 499 (1938).

Where a vacancy in a public office occurs by virtue of the constitutional provision against double office holding, such vacancy occurs as of the date of the acceptance of the second office unaffected by the fact that the person accepting the second office continues to discharge the duties of the office in good faith, since ignorance of the law excuses no man. *State ex rel. Atkins v. Fortner*, 236 N.C. 264, 72 S.E.2d 594 (1952).

Same—As Depending on Whether First Office Is State or Federal Office.—The constitutional inhibition against double office holding is enforced in alternative ways, depending on whether the first office is a State or a federal office. 1. Where one holding a first office under the State violates this section by accepting a second office under either the State or the United States without surrendering the first office, he automatically and instantly vacates the first office, and he does not thereafter act as either a *de jure* or a *de facto* officer in performing functions of the first office because he has neither right nor color of right to it. 2. Where one holding a first office under the United States violates the section by accepting a second office under the State without surrendering the first office, his attempt to qualify for the second office is absolutely void, and he does not act as either a *de jure* or a *de facto* officer in performing functions of the second office.

because he has neither right nor color of right to it. *Edwards v. Board of Educ.*, 235 N.C. 345, 70 S.E.2d 170 (1952).

Actions for Removal Where One Accepts Second Office.—When a person holding an office or place of trust accepts and qualifies for a second office, within the meaning of this section, the first office ipso facto becomes vacated, and an action to declare the first office vacant may be instituted in the name of the State on the relation of the Attorney General, by any individual who is a citizen and taxpayer of the jurisdiction where the officer is to exercise the powers of his office, but such an action cannot be maintained unless it appears that the leave of the Attorney General has been obtained either before the commencement of the action or afterwards supplied pending the proceedings. *Midgett v. Gray*, 158 N.C. 133, 73 S.E. 791 (1912). See G.S. § 1-515.

A statute providing that the incumbent of one public office should also fill another public office is unconstitutional as violating this section, and cannot be upheld as merely affording the choice between the offices so that the acceptance of the second office would ipso facto vacate the first, since incumbency in the first is essential to incumbency in the second. But a statute which creates no new office and appoints no additional officer, but merely attaches new duties to offices already existing, to be performed by the incumbents therein, does not violate this section. *State ex rel. Brigman v. Baley*, 213 N.C. 119, 195 S.E. 617 (1938).

Sec. 10. *Continuation in office.* In the absence of any contrary provision, all officers in this State, whether appointed or elected, shall hold their positions until other appointments are made or, if the offices are elective, until their successors are chosen and qualified.

Editor's Note.—The provisions of this section are similar to those of Art. XIV, § 5, Const. 1868.

ARTICLE VII

LOCAL GOVERNMENT

Section 1. *General Assembly to provide for local government.* The General Assembly shall provide for the organization and government and the fixing of boundaries of counties, cities and towns, and other governmental subdivisions, and, except as otherwise prohibited by this Constitution, may give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable.

Editor's Note.—The provisions of this section are similar to those of Art. VIII, § 4, Const. 1868, as amended in 1916, and the cases in the following annotation were decided under that section.

For an article on local legislation in the

Imposition of Additional Duties.—Chapter 341, Public-Local Laws of 1931, providing that the chairmen of certain county boards of Madison County should elect a tax manager for the county, merely imposes additional duties ex officio upon the said chairmen, and does not provide that any one of them should hold two public offices in violation of this section. *Freeman v. Board of County Comm'rs*, 217 N.C. 209, 7 S.E.2d 354 (1940).

Delegation of Duties. — A statute which places the affairs of a municipal corporation in the hands of a city council and a city manager and provides that in the event of a vacancy in the office of city manager, by sickness or otherwise, the council may delegate the duties of this office to one of its members, to be performed ex officio as mere auxiliary duties with such compensation as the council may determine, but shall receive no salary as a member of the council, is held not to contravene this section. *State ex rel. Grimes v. Holmes*, 207 N.C. 293, 176 S.E. 746 (1934).

Naval Officer Appointed to Office of Zoning Commissioner. — A naval officer holds office under the United States government and therefore under the provision of this section he could not hold the office of zoning commissioner, and was neither a de facto nor a de jure commissioner. *Vance S. Harrington & Co. v. Renner*, 236 N.C. 321, 72 S.E.2d 838 (1952).

General Assembly discussing this section, see 45 N.C.L. Rev. 340 (1967).

Counties, cities and towns are governmental agencies of the State, created by the legislature for administrative purposes, and the legislature retains control

and supervision over both classes of municipal corporations, limited only by this section. *Town of Saluda v. County of Polk*, 207 N.C. 180, 176 S.E. 298 (1934).

Municipal corporations are instrumentalities of the State for the administration of local government. They are created by the General Assembly under the general authority conferred by this section. They have such powers as are expressly conferred by statute and those necessarily implied therefrom. *Town of Grimesland v. City of Washington*, 234 N.C. 117, 66 S.E.2d 794 (1951).

And Derive Their Powers Almost Solely from Legislative Enactment. — Municipal corporations derive their powers almost solely from legislative enactment under this section, and are subject to statutory restrictions and regulations of their taxing power. *Purser v. Ledbetter*, 227 N.C. 1, 40 S.E.2d 702 (1946).

This section seems to give a general control to the legislature on the subject of municipal corporations, and the legislature may, under it, restrict the power of taxation by corporations as it may think proper, due regard being had to other parts of the Constitution. *Pullen v. Board of Comm'rs*, 68 N.C. 451 (1873).

The setting up of a municipal corporation by the legislature at any place, under this section, is left to legislative discretion. *Starmount Co. v. Ohio Sav. Bank & Trust Co.*, 55 F.2d 649 (4th Cir. 1932).

Section Does Not Prohibit Local Acts. — This section contains no prohibition on the exercise of legislative power, and has in it no declaration that private, local, or special acts shall not be passed relating to the organization of cities and towns, and conferring particular powers, and this omission, when considered in connection with the history of the recent amendments to the Constitution, is fatal to the claim that local or special acts may not be legally enacted, conferring special authority on municipal corporations. In *re Annexation Ordinances*, 253 N.C. 637, 117 S.E.2d 795 (1961).

Alteration of Charter Not Forbidden. — This section does not forbid altering or amending charters of cities, towns and incorporated villages or conferring upon municipal corporations additional powers or restricting the powers theretofore vested in them. *Holton v. Town of Mocksville*, 189 N.C. 144, 126 S.E. 326 (1924). See *Deese v. Town of Lumberton*, 211 N.C. 31, 188 S.E. 857 (1936); *Candler v. City of Asheville*, 247 N.C. 398, 101 S.E.2d 470 (1958).

Control of Finances. — The legislature has plenary power to control the finances of the municipal corporations which it creates, and to direct how their revenues shall be applied. Hence it can direct that revenues derived from municipal enterprises shall be applied on outstanding bonds as well as upon bonds to be issued thereafter. *George v. City of Asheville*, 80 F.2d 50, 103 A.L.R. 568 (4th Cir. 1935).

Authority May Be Enlarged, Abridged or Withdrawn. — The authority of cities and towns as instrumentalities for the administration of local government may be enlarged, abridged or withdrawn entirely at the will or pleasure of the legislature. *Town of Murphy v. C.A. Webb & Co.*, 156 N.C. 402, 72 S.E. 460 (1911); *Rhodes v. City of Asheville*, 230 N.C. 134, 52 S.E.2d 371 (1949).

The legislature may restrict or limit the power of incorporated towns or cities to tax or contract debts for purposes which fall within the class of necessary expenses, for they are but the State's instrumentalities for the administration of local government; and when this restriction is thus placed upon them, or it is required of them to submit the question of a bond issue to popular vote, and an issue of bonds is made without compliance therewith, the issue is invalid. *Town of Murphy v. C.A. Webb & Co.*, 156 N.C. 402, 72 S.E. 460 (1911), and cases cited therein.

Although a municipality may ordinarily levy a tax, as a necessary expense in the cases mentioned in Art. V, § 2, without submitting the question to the qualified voters, it may not do so where the legislature by statute requires the consent of such voters. *Wadsworth v. City of Concord*, 133 N.C. 587, 45 S.E. 948 (1903); *Robinson v. City of Goldsboro*, 135 N.C. 382, 47 S.E. 462 (1904); *Ellison v. Town of Williamston*, 152 N.C. 147, 67 S.E. 255 (1910). It is for the legislature to decide when it is necessary to pass a restrictive statute. *State v. Irvin*, 126 N.C. 989, 35 S.E. 430 (1900). As to specific cases wherein it is necessary to secure the consent of the voters, see Art. V, § 2, and note thereto.

A school district is not within the purview of this section, it being not a city, town or incorporated village. *Felmet v. Commissioners of Buncombe*, 186 N.C. 251, 119 S.E. 353 (1923); *Waters v. Board of Comm'rs*, 186 N.C. 719, 120 S.E. 450 (1923).

Sec. 2. *Sheriffs*. In each county a Sheriff shall be elected by the qualified voters thereof at the same time and places as members of the General Assembly are elected and shall hold his office for a period of four years, subject to removal for cause as provided by law.

Cross Reference. — As to sheriffs, see G.S. § 162-1 et seq.

Editor's Note.—The provisions of this section are similar to those of Art. VII, § 5, Const. 1868, as amended in 1962. The cases in the following annotation were decided under similar provisions of Art. IV, § 24, Const. 1868, prior to the amendment of 1962.

A sheriff occupies a constitutional public office, and a sheriff takes office, not by contract, but by commission subject to the power of the legislature to fix fees and compensation for which the Constitution

does not provide. *Borders v. Cline*, 212 N.C. 472, 193 S.E. 826 (1937).

Deputy Sheriffs. — While the office of sheriff is provided for by this section, the right of the sheriff to appoint deputies is a common-law right and deputies appointed by the sheriff are public officers, but their duties and authority relate only to ministerial duties imposed by law upon the sheriff, in the performance of which they act for the sheriff in his name and right. *Gowens v. Alamance County*, 216 N.C. 107, 3 S.E.2d 339 (1939).

Sec. 3. *Merged or consolidated counties*. Any unit of local government formed by the merger or consolidation of a county or counties and the cities and towns therein shall be deemed both a county and a city for the purposes of this Constitution, and may exercise any authority conferred by law on counties, or on cities and towns, or both, as the General Assembly may provide.

Editor's Note.—This section is new with the Constitution of 1970.

ARTICLE VIII CORPORATIONS

Section 1. *Corporate charters*. No corporation shall be created, nor shall its charter be extended, altered, or amended by special act, except corporations for charitable, educational, penal, or reformatory purposes that are to be and remain under the patronage and control of the State; but the General Assembly shall provide by general laws for the chartering, organization, and powers of all corporations, and for the amending, extending, and forfeiture of all charters, except those above permitted by special act. All such general acts may be altered from time to time or repealed. The General Assembly may at any time by special act repeal the charter of any corporation.

Editor's Note.—The provisions of this section are similar to those of Art. VIII, § 1, Const. 1868, as amended in 1916, and the cases in the following annotation were decided under that section.

For an article on local legislation in the General Assembly, discussing this section, see 45 N.C.L. Rev. 340 (1967).

In General.—Except for purposes of absolute repeal which is retained throughout as essential to the proper exercise and enforcement of the police powers of government, and except, also, in the instances expressly designated in this section, this section withdraws from the General Assembly any and all power by special enactments to create, extend, alter, or amend the charter of all private business corporations, and all quasi-public corporations, such as railroads, incorporated turnpike or toll roads, bridge companies, and the like, and also those corporations which while

having at times and to some extent powers appertaining to government are in fact and in truth business corporations for the purpose principally of promoting private interest. *Watts v. Lenoir & Blowing Rock, Tpk. Co.*, 181 N.C. 129, 106 S.E. 497 (1921).

Before the constitutional prohibition of this section, against creating corporations or amending their charters by special act, the General Assembly had granted numerous charters to utility companies giving them authority to set their own rates. However, such charter authority does not preclude rate regulation under the power of the State. Contracts between utilities and consumers setting the price of current are also subject to rate regulation. See 12 N.C.L. Rev. 296.

Purpose of Section. — The purpose and effect of this section is to enable the State to control, modify or repeal corporate powers, thus avoiding the effect of the

doctrine announced in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 4 L. Ed. 629 (1819), *Elizabeth City Water & Power Co. v. City of Elizabeth City*, 188 N.C. 278, 124 S.E. 611 (1924). See also *Atlantic & N.C.R.R. v. Dortch*, 124 N.C. 663, 33 S.E. 1014 (1899).

This article and Art. VII give the legislature complete authority to create, control, and dissolve cities, towns, and other public corporations or governmental agencies. *State ex rel. East Lenoir Sanitary Dist. v. City of Lenoir*, 249 N.C. 96, 105 S.E.2d 411 (1958).

Only "Special Acts" Prohibited.—This section only prohibits the enactment of a special act, and an act which relates to all municipal corporations of a county, including cities, towns, townships, and school districts is not a special act within its meaning and intent. *Kornegay v. City of Goldsboro*, 180 N.C. 441, 105 S.E. 187 (1920).

And Prohibition of Special Acts Applies Only to Private Corporations.—The provisions of this section, prohibiting the legislature from creating a corporation or extending, altering or amending its charter by special act has been held to apply only to private or business corporations; and where the legislature by special act amending the charter of a city authorizes it to purchase electricity and resell it to its inhabitants and those within a three-mile zone of the city, the power to sell to such individuals and corporations does not detract from the public service or destroy the public character of the municipality, and where the same power is given the city by general statute also, the exercise of the power thus conferred will not be enjoined. *Holmes v. City of Fayetteville*, 197 N.C. 740, 150 S.E. 624 (1929).

The prohibition contained in this section refers only to private or business corporations, and does not refer to public or quasi-public corporations acting as governmental agencies. *Mills v. Board of Comm'rs*, 175 N.C. 215, 95 S.E. 481 (1918); *Dickson v. Brewer*, 180 N.C. 403, 104 S.E. 887 (1920). See *Webb v. Port Comm'n*, 205 N.C. 663, 172 S.E. 377 (1934); *In re Annexation Ordinances*, 253 N.C. 637, 117 S.E.2d 795 (1961).

Legislature May Create Corporation for Public Purpose.—The legislative power as to State and political and administrative subdivisions thereof is restrained only by the limitations imposed by the State Constitution or that of the United States, and there is no constitutional limitation on power of the General Assembly to create a corporation for a public purpose. *Brumley v. Baxter*, 225 N.C. 691, 36 S.E.2d 281, 162 A.L.R. 930 (1945).

A commission created as an agency of the State to perform the governmental function of providing port facilities for the commerce of the State in the public interest, and not for private gain, is a public corporation, and the legislature is not prohibited from creating such corporation by this section, nor is the act creating it a special act within the meaning of this section, and the commission may lawfully exercise all powers conferred upon it in order to perform its duties as prescribed by the act. *Webb v. Port Comm'n*, 205 N.C. 663, 172 S.E. 377 (1934).

Right of Alteration a Part of Every Charter.—The provisions of this section, affecting the organization of corporations, and specifically providing that all such laws may be altered from time to time or repealed, enters into every charter taken out or corporation formed thereunder, and any such corporation may not complain when a statutory repeal or amendment has been made, on the ground that it works a hardship on it or impairs the value of its property, unless vested rights have been acquired by it which have been impaired or destroyed by the repealing or amendatory act complained of. *State v. Cantwell*, 142 N.C. 604, 55 S.E. 820 (1906); *Yadkin River Power Co. v. Whitney Co.*, 150 N.C. 31, 63 S.E. 188 (1908); *Elizabeth City Water & Power Co. v. City of Elizabeth City*, 188 N.C. 278, 124 S.E. 611 (1924).

Power to Extinguish Corporations.—The General Assembly may, at its discretion, abolish municipal as well as other corporations, because they are all alike creatures of its will, and exist only at its pleasure. *Ward v. Elizabeth City*, 121 N.C. 1, 27 S.E. 993 (1897).

Effect of Dissolution.—Upon the dissolution or extinction of a corporation under this section for any cause, real property conveyed to it in fee does not revert to the original grantors or their heirs, and its personal property does not escheat to the State; and this is so whether or not the duration of the corporation was limited by its charter or general statute. *Wilson v. Leary*, 120 N.C. 90, 26 S.E. 630 (1897), overruling *Fox v. Horah*, 36 N.C. 358 (1841).

Where the legislature deprived the board of township trustees of its existence as a municipal corporation, the right to sue and be sued were likewise extinguished, and hence it could not thereafter be a party to a suit. *Wallace v. Board of Trustees*, 84 N.C. 164 (1881).

Sec. 2. *Corporations defined.* The term "corporation" as used in this Section shall be construed to include all associations and joint-stock companies having any of the powers and privileges of corporations not possessed by individuals or partnerships. All corporations shall have the right to sue and shall be subject to be sued in all courts, in like cases as natural persons.

Editor's Note.—The provisions of this section are similar to those of Art. VIII, § 3, Const. 1868, as amended in 1916.

ARTICLE IX EDUCATION

Section 1. *Education encouraged.* Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged.

Editor's Note. — The provisions of this section are similar to those of Art. IX, § 1, Const. 1868, and the cases in the following annotation were decided under that section.

For comment on the public purpose doctrine, see 3 Wake Forest Intra. L. Rev. 37 (1967).

This and the following sections are **mandatory** in their provisions. Fuller v. Lockhart, 209 N.C. 61, 182 S.E. 733 (1935); Mebane Graded School Dist. v. County of Alamance, 211 N.C. 213, 189 S.E. 873 (1937). See also Elliott v. State Bd. of Equalization, 203 N.C. 749, 166 S.E. 918 (1937).

The duty imposed on the State under this article is mandatory. Harris v. Board of Comm'rs, 274 N.C. 343, 163 S.E.2d 387 (1968).

Sec. 2. *Uniform system of schools.*

(1) *General and uniform system: term.* The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.

(2) *Local responsibility.* The General Assembly may assign to units of local government such responsibility for the financial support of the free public schools as it may deem appropriate. The governing boards of units of local government with financial responsibility for public education may use local revenues to add to or supplement any public school or post-secondary school program.

Editor's Note.—The provisions of subsection (1) of this section are similar to those of Art. IX, § 2, Const. 1868, as amended by the Convention of 1875. Subsection (2) of this section corresponds to Art. IX, § 3, Const. 1868. That section, as amended in 1918, provided that each county should be divided into districts, in which one or more public schools should be maintained at least six months in every year, and made county commissioners liable to indictment for failure to comply with the section. The cases in the following annotation were decided under Art. IX, §§ 2 and 3, Const. 1868.

Provision for Education Is for a Public Purpose.—The education of residents of the State is a recognized object of State government. Hence, provision therefor is for a public purpose. State Educ. Assistance Authority v. Bank of Statesville, 276 N.C. 576, 174 S.E.2d 551 (1970).

Methods Are to Be Determined by General Assembly. — Subject to constitutional limitations, methods to facilitate and achieve the public purpose of providing for the education or training of residents of this State in institutions of higher education of post-secondary schools are for determination by the General Assembly. State Educ. Assistance Authority v. Bank of Statesville, 276 N.C. 576, 174 S.E.2d 551 (1970).

In General.—It was said by the court in Lane v. Stanly, 65 N.C. 153 (1871): "It will be seen that the Constitution establishes the public school system, and the General Assembly provides for it, by its own taxing power, and by the taxing power of the counties, and the State Board of Education, by the aid of school committees, manage it. It will be observed that it is to be a 'system'; it is to be 'general,' and it is to be 'uniform.' It is not to be subject to the caprices of localities, but every locality, yea, every child, is to have the same advantage and be subject to the same rules and regulations."

The requirement of this section of the Constitution, that the public school system shall be uniform by legislative authority, relates to the uniformity of the "system," and not to the uniformity of the class or kind of the "schools"; and thus qualifying the word "system," it is sufficiently complied with where, by statute or authorized regulation of the public school authorities, provision is made for establishment of schools of like kind throughout all sections of the State and available to all of the school population of the territories contributing to their support. *Board of Educ. v. Board of County Comm'rs*, 174 N.C. 469, 93 S.E. 1001 (1917).

This section contemplates that the General Assembly shall provide a State system of public schools to the end that every child, without regard to the county in which such child resides, shall have an opportunity to attend a school in which standards set up by the State are maintained and wherein tuition shall be free of charge. *Marshallburn v. Brown*, 210 N.C. 331, 186 S.E. 265 (1936); *Constantian v. Anson County*, 244 N.C. 221, 93 S.E.2d 163 (1956).

The provisions of this section and § 1 of this article are mandatory that the legislature provide by taxation and otherwise for a general and uniform system of public education, free of charge, to all of the children of the State and for the continuance of the school term in the various districts for at least six months (now nine months) in each and every year. *Lacy v. Fidelity Bank*, 183 N.C. 373, 111 S.E. 612 (1922). See *Mebane Graded School Dist. v. County of Alamance*, 211 N.C. 213, 189 S.E. 873 (1937). See also *Collie v. Commissioners of Franklin County*, 145 N.C. 170, 59 S.E. 44 (1907).

The provision of this section is mandatory and may not be disregarded either by the legislature or by officials charged with the duty of administering the law. *Blue v. Durham Pub. School Dist.*, 95 F. Supp. 441 (M.D.N.C. 1951).

This section is mandatory, but the mode of performance is prescribed by statute. *City of Hickory v. Catawba County*, 206 N.C. 165, 173 S.E. 56 (1934).

It is the duty of the State to provide a general and uniform State system of public schools of at least six months (now nine months) in every year, wherein tuition shall be free of charge to all the children of the State. It is a necessary expense and a vote of the people is not required to make effective these and other constitutional provisions in relation to the public school system of the State. *Mebane Graded School Dist. v. County of*

Alamance, 211 N.C. 213, 189 S.E. 873 (1937). See also *Fuller v. Lockhart*, 209 N.C. 61, 182 S.E. 733 (1935).

Duty Is Imposed on General Assembly.

—It is the province of the General Assembly, and not of the State Board of Education, to establish a uniform system of public schools. *Board of Educ. v. State Bd. of Educ.*, 114 N.C. 313, 19 S.E. 277 (1894). See also *Bridges v. City of Charlotte*, 221 N.C. 472, 20 S.E.2d 825 (1942).

The establishment and maintenance of a general and uniform system of public schools is upon and exclusively within the province of the General Assembly. *Moore v. Board of Educ.*, 212 N.C. 499, 193 S.E. 732 (1937), and cases cited therein.

It is a legislative function to formulate the means of carrying out the provisions of this section. *Wilkinson v. Board of Educ.*, 199 N.C. 669, 155 S.E. 562 (1930).

The establishment and operation of the public school system is under the control of the legislative branch of the government, subject only to pertinent constitutional provisions as to uniformity and length of term. *Coggins v. Board of Educ.*, 223 N.C. 763, 28 S.E.2d 527 (1944).

No Limitation on School Term. — The mandatory provision of this section to the effect that one or more public schools shall be maintained at least six months (now nine months) in every year, wherein tuition shall be free of charge to children of the State, is not a limitation as to the length of the school term; it is the minimum required by the Constitution. *Harris v. Board of Comm'rs*, 274 N.C. 343, 163 S.E.2d 387 (1968).

This section having required a public school system of the State to have at least six-months (now nine-months) terms in each year, leaves it to the discretionary power of the legislature to fix terms in excess of that period. *Frazier v. Board of Comm'rs*, 194 N.C. 49, 138 S.E. 433 (1927).

The mandate of this article carries with it not merely the bare necessity of instructional service, but all facilities reasonably necessary to accomplish this main purpose. *Harris v. Board of Comm'rs*, 1 N.C. App. 258, 161 S.E.2d 213 (1968).

Maintenance of the public schools and the furnishing of those things which are reasonably essential to that end are within the mandatory provision of this article, unaffected by the "necessary expense" provision contained in N.C. Const., Art. V, § 2, subsection (5), and § 4, subsection (2). *Harris v. Board of Comm'rs*, 1 N.C. App. 258, 161 S.E.2d 213 (1968).

Buildings and Equipment Necessary.— Sites, buildings, and equipment acquired,

constructed, and used by a school district were deemed reasonably essential and necessary for the conduct and operation of the required school term at the time the said sites, buildings, and equipment were acquired and constructed. *Mebane Graded School Dist. v. County of Alamance*, 211 N.C. 213, 189 S.E. 873 (1937).

The financing of the public school system of the State is in the discretion of the General Assembly by appropriate legislation, either by State appropriation or through the county acting as an administrative agency of the State. *Mebane Graded School Dist. v. County of Alamance*, 211 N.C. 213, 189 S.E. 873 (1937).

Distribution of Funds.—All of the funds raised in the State for common school purposes should be distributed per capita among the beneficiaries and not be retained in the counties where it is raised. *Board of Educ. v. State Bd. of Educ.*, 114 N.C. 313, 19 S.E. 277 (1894); *Board of School Comm'rs v. County Bd. of Educ.*, 169 N.C. 196, 85 S.E. 138 (1915). And in the distribution of the fund the General Assembly may not discriminate in favor, or to the prejudice of either the white or colored race. *Hooker v. Town of Greenville*, 130 N.C. 472, 42 S.E. 141 (1902).

Counties May Be Directed to Provide Funds.—It is within the power of the General Assembly to authorize and direct the counties of the State as administrative units or governmental agencies to provide the necessary funds by taxation or otherwise. *Harrell v. Board of Comm'rs*, 206 N.C. 225, 173 S.E. 614 (1934).

County May Act as Agent of State.—The Constitution requires the General Assembly to provide for a general and uniform system of public instruction. In fulfilling this purpose, the General Assembly may act through the agency of the county. When the county acts as agent of the State in carrying out legislative enactments, its actions fall within the authority granted by this section. *Benvenue Parent-Teacher Ass'n v. Nash County Bd. of Educ.*, 4 N.C. App. 617, 167 S.E.2d 538 (1969).

A county is an administrative unit of the State in our statewide public school system, and a statute requiring a county to maintain at least a six-months (now nine-months) school term in each of its school districts and to provide the necessary funds therefor by taxation or otherwise, is valid. *Evans v. Mecklenburg County*, 205 N.C. 560, 172 S.E. 323 (1934).

A county board of education has the constitutional obligation to correct educational disparities in school facilities between schools heretofore maintained for negro

students and schools previously maintained for white students, and to afford all students of all races in all schools equal educational opportunities. *Coppedge v. Franklin County Bd. of Educ.*, 273 F. Supp. 289 (E.D.N.C. 1967), *aff'd*, 394 F.2d 410 (4th Cir. 1968).

The operation of the public schools as required by this article is a "necessary expense" not requiring a vote of the electorate under N.C. Const., Art. V, §§ 2 and 4. *Yoder v. Board of Comm'rs*, 7 N.C. App. 712, 173 S.E.2d 529 (1970).

And Bond Issue for Student Loans Is for a Public Purpose.—Where bond proceeds are to be used solely to make loans to meritorious North Carolinians of slender means and thereby minimize the number of qualified persons whose education or training is interrupted or abandoned for lack of funds, the bond proceeds are used for a public purpose when used to make such loans. *State Educ. Assistance Authority v. Bank of Statesville*, 276 N.C. 576, 174 S.E.2d 551 (1970).

It is expected that a student loan will inure to the private benefit of the person who obtains it. It is equally true that the education provided throughout the entire school system is intended to inure to the benefit of the individual who obtains it. However, the fact that the individual obtains a private benefit cannot be considered sufficient ground to defeat the execution of the paramount public purpose of encouraging education. *State Educ. Assistance Authority v. Bank of Statesville*, 276 N.C. 576, 174 S.E.2d 551 (1970).

Levy of County Tax to Supplement Teachers' Salaries.—In levying an additional tax for the purpose of supplementing teachers' salaries pursuant to G.S. § 115-80 (a), the board of county commissioners acts as an agency of the State under a delegation of authority from the General Assembly to carry out the duty imposed upon it by this section to maintain a system of public schools, and there is no requirement that such levy be submitted to a vote of the people, the limitations imposed by N.C. Const., Art. V, § 2, subsection (5), which is applicable solely to municipalities and not to agencies of the State. *Harris v. Board of Comm'rs*, 1 N.C. App. 258, 161 S.E.2d 213 (1968).

The last paragraph of G.S. § 115-80 (a) is authorized by this section and does not violate the provisions of Art. V, § 2, subsection (5). *Harris v. Board of Comm'rs*, 1 N.C. App. 258, 161 S.E.2d 213 (1968).

Tax Levy for County School Capital Reserve Fund.—Section 115-80.1 of the Gen-

eral Statutes, authorizing the county board of commissioners to levy an ad valorem tax for a county school capital reserve fund, which is to be used for the purpose of anticipating school capital outlays, is a valid exercise of legislative authority; the creation of such fund is for a "necessary expense" within the meaning of N.C. Const., Art. V, § 2, and does not require a vote of the people. *Yoder v. Board of Comm'rs*, 7 N.C. App. 712, 173 S.E.2d 529 (1970).

Expenditure of funds by county for operation of a technical institute for adult vocational and general educational training without a vote of the people does not violate N.C. Const., Art. V, § 2, subsection (5) and § 4, subsection (2), since in expending such funds the county acts as an agency of the State in carrying out the mandate of this section requiring the General Assembly to provide for a general and uniform system of public instruction. *Benvenue Parent-Teacher Ass'n v. Nash County Bd. of Educ.*, 4 N.C. App. 617, 167 S.E.2d 538 (1969).

County's Obligation in Relation to Tax Limitation Provisions of N.C. Const., Art. V, § 1.—See *Board of Educ. v. Board of Comm'rs*, 111 N.C. 578, 16 S.E. 621 (1892); *Board of Educ. v. Board of County Comm'rs*, 174 N.C. 469, 93 S.E. 1001 (1917); *Harris v. Board of Comm'rs*, 274 N.C. 343, 163 S.E.2d 387 (1968).

Sec. 3. *School attendance.* The General Assembly shall provide that every child of appropriate age and of sufficient mental and physical ability shall attend the public schools, unless educated by other means.

Editor's Note.—The provisions of this section are similar to those of Art. IX, § 11, Const. 1868, as amended in 1942.

Sec. 4. *State Board of Education.*

(1) *Board.* The State Board of Education shall consist of the Lieutenant Governor, the Treasurer, and eleven members appointed by the Governor, subject to confirmation by the General Assembly in joint session. The General Assembly shall divide the State into eight educational districts. Of the appointive members of the Board, one shall be appointed from each of the eight educational districts and three shall be appointed from the State at large. Appointments shall be for overlapping terms of eight years. Appointments to fill vacancies shall be made by the Governor for the unexpired terms and shall not be subject to confirmation.

(2) *Superintendent of Public Instruction.* The Superintendent of Public Instruction shall be the secretary and chief administrative officer of the State Board of Education.

Editor's Note.—The provisions of this section are similar to those of Art. IX, § 8, Const. 1868, as amended in 1942 and 1944, and the case cited in the following annotation was decided under that section.

Duty to End Segregation in Schools. — The State school board has an affirmative

Exemption of School Bonds from Taxation Is Valid.—See *County of Mecklenburg v. Piedmont Fire Ins. Co.*, 210 N.C. 171, 185 S.E. 654 (1936).

Assumption of Indebtedness of School District.—When necessary to maintain the term of public schools required by the Constitution, it is within the legislative authority in establishing its statewide system to assume an indebtedness of a school district therefor, including the cost of necessary buildings, and direct that it be provided for by the respective counties as administrative units of the public school system of the State. *Lovelace v. Pratt*, 187 N.C. 686, 122 S.E. 661 (1924). As to mandamus to compel the assumption by a county of indebtedness incurred by school districts for the erection and equipment of school buildings necessary to the constitutional school term, see *City of Hickory v. Catawba County*, 206 N.C. 165, 173 S.E. 56 (1934).

Mandamus to Compel County Commissioners to Maintain Schools.—See *County Bd. of Educ. v. Board of Comm'rs*, 150 N.C. 116, 63 S.E. 724 (1909); *City of Hickory v. Catawba County*, 206 N.C. 165, 173 S.E. 56 (1934); *Mebane Graded School Dist. v. County of Alamance*, 211 N.C. 213, 189 S.E. 873 (1937).

Redistricting for School Purposes.—See *Moore v. Board of Educ.*, 212 N.C. 499, 193 S.E. 732 (1937).

duty to exercise its authority to the end that school segregation be eliminated. *Godwin v. Johnston County Bd. of Educ.*, 301 F. Supp. 1339 (E.D.N.C. 1969).

Whether or not the State Board of Education or State Superintendent has actively discriminated against negroes does not af-

fect their burden to actively seek the desegregation of the public schools in North Carolina. The burden rests upon them, as well as upon the local school board to come forward with a plan that promises realistically to work. *Godwin v. Johnston County Bd. of Educ.*, 301 F. Supp. 1339 (E.D.N.C. 1969).

The State's duty to effect a transition

Sec. 5. Powers and duties of Board. The State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support, except the funds mentioned in Section 7 of this Article, and shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly.

Editor's Note.—The provisions of this section are similar to those of Art. IX, § 9, Const. 1868, as amended in 1942, and the case cited in the following annotation was decided under that section.

Regulation of Private Schools. — The State has the power and authority to establish minimum standards for, and to regulate in a reasonable manner, private schools giving instruction to children of compulsory school age. This is necessarily true because such schools affect the public school system. In this connection it has authority, among others, to inspect, supervise, and examine them, their teachers, and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught that is manifestly inimical to the public welfare. *State v. Williams*, 253 N.C. 337, 117 S.E.2d 444 (1960).

Sec. 6. State school fund. The proceeds of all lands that have been or hereafter may be granted by the United States to this State, and not otherwise appropriated by this State or the United States; all moneys, stocks, bonds, and other property belonging to the State for purposes of public education; the net proceeds of all sales of the swamp lands belonging to the State; and all other grants, gifts, and devises that have been or hereafter may be made to the State, and not otherwise appropriated by the State or by the terms of the grant, gift, or devise, shall be paid into the State Treasury and, together with so much of the revenue of the State as may be set apart for that purpose, shall be faithfully appropriated and used exclusively for establishing and maintaining a uniform system of free public schools.

Editor's Note. — The provisions of this section are similar to those of Art. IX, §

from the dual system of schools formerly imposed by the Constitution and laws of the State of North Carolina to a unitary nonracial school system falls not only upon the local school boards, but also upon the State Board of Education and the State Superintendent of Public Instruction. *Godwin v. Johnston County Bd. of Educ.*, 301 F. Supp. 1339 (E.D.N.C. 1969).

The constitutional authority of the State Board of Education to make regulations for and supervise and administer schools is confined to public schools and activities substantially affecting public schools and the public school system. It may have and exert only such authority in the supervision and control of private schools and their agents and representatives as is conferred by the General Assembly in the proper exercise of the police power of the State. *State v. Williams*, 253 N.C. 337, 117 S.E.2d 444 (1960).

Must Not Be Arbitrary.—While the legislature, under the police power, may regulate education in many respects in private schools, the exercise of such power of regulation must not be arbitrary, and must be limited to the preservation of the public safety, the public health, or the public morals. *State v. Williams*, 253 N.C. 337, 117 S.E.2d 444 (1960).

4, Const. 1868, as amended by the Convention of 1875.

Sec. 7. County school fund. All moneys, stocks, bonds, and other property belonging to a county school fund, and the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools.

Editor's Note.—The provisions of this section are similar to those of Art. IX, § 5, Const. 1868, as added by the Convention of 1875, and the cases in the following annotation were decided under that section.

This section was designed in its entirety to secure two wise ends, namely: (1) to set apart the property and revenue specified therein for the support of the public school system; and (2) to prevent

the diversion of public school property and revenue from their intended use to other purposes. *Boney v. Board of Trustees*, 229 N.C. 136, 48 S.E.2d 56 (1948).

Penalties, forfeitures and fines are to be used for the support of the public schools. *McMillan v. Robeson County*, 262 N.C. 413, 137 S.E.2d 105 (1964).

This section appropriates all fines for violation of the criminal laws of the State for establishing and maintaining free public schools in the several counties, whether the fines are for violation of town ordinances made misdemeanors by statute or other criminal statutes. *Board of Educ. v. Town of Henderson*, 126 N.C. 689, 36 S.E. 158 (1900).

Under this section penalties and forfeitures belong to the State for free school purposes only when given by law to the State. *State ex rel. Carter v. Wilmington & W.R.R.*, 126 N.C. 437, 36 S.E. 14 (1900), and cases there cited.

The "clear proceeds" of a forfeiture are defined as the amount of the forfeit less the cost of collection, meaning thereby the citations and process against the bondsman usually in the practice. *Hightower v. Thompson*, 231 N.C. 491, 57 S.E.2d 763 (1950).

Municipal Clerk Not Entitled to Fees from Fines.—By provision of this section, the clear proceeds of fines collected by the clerk of a municipal court belong to the county school fund, and the clerk is not entitled to retain a percentage thereof as his fees, regardless of the provisions of public-local laws relating to his compensation. *County Bd. of Educ. v. City of High Point*, 213 N.C. 636, 197 S.E. 191 (1938).

A suit to compel a city to pay fines and penalties to the county board of education should be brought against the city or the board of aldermen, and not against the chief of police. *Bearden v. Fullam*, 129 N.C. 477, 40 S.E. 204 (1901).

"Public schools" are normally envisioned as institutions for the instruction of the young, and institutions for education beyond the high school level are not usually thought of as part of the "public schools"; however, this mode of thought does not amount to a constitutional prohibition of use of the term "public schools" to include adult or technical education. *Benvenue*

Parent-Teacher Ass'n v. Nash County Bd. of Educ., 4 N.C. App. 617, 167 S.E.2d 538 (1969).

A school is public when it is open and public to all in the locality. *Benvenue Parent-Teacher Ass'n v. Nash County Bd. of Educ.*, 4 N.C. App. 617, 167 S.E.2d 538 (1969).

A school is an institution consisting of a teacher and pupils, irrespective of age, gathered together for instruction in any branch of learning, the arts or the sciences. *Benvenue Parent-Teacher Ass'n v. Nash County Bd. of Educ.*, 4 N.C. App. 617, 167 S.E.2d 538 (1969).

A county technical institute which provides adult vocational and general educational training is a part of the public school system of the State, and the expenditure of funds by a county as authorized by G.S. § 115-234 et seq. for maintenance of a building used by such technical institute does not violate this section. *Benvenue Parent-Teacher Ass'n v. Nash County Bd. of Educ.*, 4 N.C. App. 617, 167 S.E.2d 538 (1969).

The expenditure of funds by a county for maintenance of a building used by a county technical institute is fully authorized by statutes (G.S. § 115-234 et seq.) and is not at odds with the meaning or purpose of this section. *Benvenue Parent-Teacher Ass'n v. Nash County Bd. of Educ.*, 4 N.C. App. 617, 167 S.E.2d 538 (1969).

The maintenance of an athletic field and playground is a proper use of school funds, since physical training is a legitimate function of education. *Boney v. Board of Trustees*, 229 N.C. 136, 48 S.E.2d 56 (1948).

An agreement under which a graded school district, without monetary consideration, was to transfer in fee to a municipality a tract of school property, and the municipality was to construct thereon an athletic stadium and grant the graded schools of the district free and unlimited use of the stadium and grounds during the school term except when required for regularly scheduled games of a professional baseball association, did not constitute a diversion of school property in contravention of this section. *Boney v. Board of Trustees*, 229 N.C. 136, 48 S.E.2d 56 (1948).

Sec. 8. Higher education. The General Assembly shall maintain a public system of higher education, comprising The University of North Carolina and such other institutions of higher education as the General Assembly may deem wise. The General Assembly shall provide for the selection of trustees of The University of North Carolina and of the other institutions of higher education, in whom shall be vested all the privileges, rights, franchises, and endowments heretofore granted to or conferred upon the trustees of these institutions. The General Assembly may enact

laws necessary and expedient for the maintenance and management of The University of North Carolina and the other public institutions of higher education.

Editor's Note.—The provisions of this section are similar to those of Art. IX, § 6, Const. 1868, as added in 1872-73, and the cases cited in the following annotation were decided under that section.

Rule-Making Power of Trustees of University.—Under the Constitution and statutes of this State, the management of the University of North Carolina is delegated to and invested in the board of trustees, and the board of trustees may make all necessary and proper and reasonable rules and regulations for the orderly management and government of the University of

North Carolina and for the preservation of discipline of its students. In re Carter, 262 N.C. 360, 137 S.E.2d 150 (1964).

Resolution of Trustees Unconstitutional.—A resolution of the board of trustees of the University of North Carolina declaring the policy of the board that applications of negroes to the undergraduate schools of the University be not accepted violated the equal protection clause of the Fourteenth Amendment to the U.S. Constitution. *Frasier v. Board of Trustees*, 134 F. Supp. 589 (M.D.N.C. 1955), aff'd, 350 U.S. 979, 76 S. Ct. 467, 100 L. Ed. 848 (1956).

Sec. 9. *Benefits of public institutions of higher education.* The General Assembly shall provide that the benefits of The University of North Carolina and other public institutions of higher education, as far as practicable, be extended to the people of the State free of expense.

Editor's Note.—The provisions of this section are similar to those of Art. IX, § 7, Const. 1868.

Sec. 10. *Escheats.*

(1) *Escheats prior to July 1, 1971.* All property that prior to July 1, 1971, accrued to the State from escheats, unclaimed dividends, or distributive shares of the estates of deceased persons shall be appropriated to the use of The University of North Carolina.

(2) *Escheats after June 30, 1971.* All property that, after June 30, 1971, shall accrue to the State from escheats, unclaimed dividends, or distributive shares of the estates of deceased persons shall be used to aid worthy and needy students who are residents of this State and are enrolled in public institutions of higher education in this State. The method, amount, and type of distribution shall be prescribed by law. (1969, c. 827, § 1.)

Editor's Note.—The provisions of this section are similar to those of Art. IX, § 7, Const. 1868.

The amendment adopted by vote of the people at the general election held Nov. 3, 1970, effective July 1, 1971, designated the former provisions of this section as subsection (1) and made changes therein so as to restrict its application to escheats prior to July 1, 1971, and added subsection (2).

The case cited in the following annotation was decided under Art. IX, § 7, Const. 1868.

The right of succession by escheat to all property, when there is no wife or husband or parties entitled to inherit or take under the statutes of descent and distribution, has been conferred upon the University of North Carolina by this section, and extended by several statutes which are now G.S. §§ 116-20 through 116-25. *Board of Educ. v. Johnston*, 224 N.C. 86, 29 S.E.2d 126 (1944).

ARTICLE X

HOMESTEADS AND EXEMPTIONS

Section 1. *Personal property exemptions.* The personal property of any resident of this State, to a value fixed by the General Assembly but not less than \$500, to be selected by the resident, is exempted from sale under execution or other final process of any court, issued for the collection of any debt.

Cross Reference.—For statutory provisions, see G.S. § 1-369 et seq. and the notes thereto.

Editor's Note.—The provisions of this

section are similar to those of Art. X, § 1, Const. 1868, and the cases in the following annotation were decided under that section.

Exemption a Constitutional Right.—The right to the personal property exemption exists not by virtue of the allotment, but by virtue of the Constitution, which confers it and attaches the protection to the debtor before the allotment or appraisal. *Lockhart v. Bear*, 117 N.C. 298, 23 S.E. 484 (1895). See *Crow v. Morgan*, 210 N.C. 153, 185 S.E. 668 (1936).

This section and § 2, subsection (1) of this article are explicit in guaranteeing to every resident of the State his homestead and personal property exemption of the value fixed—"to be selected by the owner thereof." *McKeithen v. Blue*, 142 N.C. 360, 55 S.E. 285 (1906).

Section Liberally Construed.—See *Hyman v. Stern*, 43 F.2d 666 (4th Cir. 1930).

Debtor Entitled to Exemption at All Times.—The five hundred dollar personal property exemption prescribed by this section of the Constitution entitles a judgment debtor to the amount of the exemption at all times, and such sum may be set apart for the comfort and support of the judgment debtor as often as the judgment debtor may be pressed with execution. *Commissioner of Banks ex rel. Goldsboro Sav. & Trust Co. v. Yelverton*, 204 N.C. 441, 168 S.E. 505 (1933), commented on in 12 N.C.L. Rev. 65.

The five hundred dollar personal property exemption guaranteed by this section must be allotted from time to time as often as the judgment debtor might be pressed with execution, the policy being to enable him not only to have the exemptions allotted to him once, but to keep them about him all the time, for the comfort and support of himself and family. *New Amsterdam Cas. Co. v. Waller*, 196 F. Supp. 780 (M.D.N.C. 1961), rev'd and remanded on other grounds, 301 F.2d 839 (4th Cir. 1962).

But Exempt Funds on Hand May Not Exceed Constitutional Amount.—A judgment debtor may claim his exemption as against successive executions but may not have exempt funds in his possession at any one time in excess of his exemption. Stated another way, a judgment debtor is privileged to make successive claims for his exemption, but may not hold free from execution at any one time an amount in excess of his exemption. *New Amsterdam Cas. Co. v. Waller*, 196 F. Supp. 780 (M.D.N.C. 1961), rev'd and remanded on other grounds, 301 F.2d 839 (4th Cir. 1962).

Although Accumulated by Successive Payments Each Less Than Constitutional Amount.—The constitutional exemption has no application to accumulated funds of a

judgment debtor, even though accumulated by a series of payments, each less than the five hundred dollar constitutional exemption. *New Amsterdam Cas. Co. v. Waller*, 196 F. Supp. 780 (M.D.N.C. 1961), rev'd and remanded on other grounds, 301 F.2d 839 (4th Cir. 1962).

Diminution in Value of Property.—In *Campbell v. White*, 95 N.C. 344 (1886), it was said: "Though the debtor's personal property exemption has been duly allotted, whenever it has been diminished by use, loss, or other cause, he has a right to have any other personal property he may have exempted up to the prescribed limit," *Smith, C.J.*, saying that this section of the Constitution is a continual mandate to the officer to leave so much of the debtor's personal estate untouched for his use, and, of course, the diminution from use, loss, or other cause must be replenished with other, if the debtor has such, up to the prescribed limits. It is plainly meant that when any final process against the debtor's estate is to be enforced, that much of his estate must be allowed to remain with him as not liable to sale. *Gardner v. McConnaughey*, 157 N.C. 481, 73 S.E. 125 (1911).

Time for Claiming Exemption.—Until there has been a levy on personal property no occasion for application of the constitutional exemption arises. *New Amsterdam Cas. Co. v. Waller*, 301 F.2d 839 (4th Cir. 1962).

The constitutional exemption can be claimed only at the moment of levy. *New Amsterdam Cas. Co. v. Waller*, 323 F.2d 20 (4th Cir. 1963).

It is only when the property is about to be subjected to the payment of a debt by final process that the last opportunity is left to the defendant to claim his exemption. At any time before this stage of the proceeding is reached, he may make his demand and become entitled to an allotment of the exemption. *Chemical Co. v. Sloan*, 136 N.C. 122, 48 S.E. 577 (1904).

The defendant may demand his exemption when a warrant of attachment is levied on his property and it is taken out of his possession, or he may wait until the final process is issued and the property is about to be appropriated by sale to the satisfaction of the same. *Chemical Co. v. Sloan*, 136 N.C. 122, 48 S.E. 577 (1904).

A debtor may legally demand his personal property exemption at any time and to the last moment before the appropriation thereof by the court, and the order of court directing a payment of the money derived from the sale of such property is

final process within the meaning of the Constitution, giving the creditor such right until execution or other final process. *Be-farrah v. Spell*, 178 N.C. 231, 100 S.E. 321 (1919); *Crow v. Morgan*, 210 N.C. 153, 185 S.E. 668 (1936).

Exemption May Not Frustrate Laws Relating to Fraudulent Conveyances.—The constitutional exemption is not a sword for the frustration of the laws relating to fraudulent conveyances. *New Amsterdam Cas. Co. v. Waller*, 323 F.2d 20 (4th Cir. 1963).

Marital Duty of Husband as "Debt".—The husband's duty to protect and provide for his wife is more than a debt in its ordinary acceptation of the word, or within the contemplation of this section and § 2, subsection (1) of this article. *Anderson v. Anderson*, 183 N.C. 139, 110 S.E. 863 (1922).

A husband's obligation to support his wife during the existence of the marital relation is not a "debt" within the meaning of this section and § 2, subsection (1) of this article. *Barber v. Barber*, 217 N.C. 422, 8 S.E.2d 204 (1940), citing *White v. White*, 179 N.C. 592, 103 S.E. 216 (1920).

Setoff.—A party may not demand that his claim be allowed him as his personal property exemption so as to defeat the adverse party's right of counterclaim or setoff prior to the rendition of the final judgment on his claim, since to permit the party to assert the exemption before judgment would enable him to obtain judgment in instances in which, if a balance were struck, nothing would be due him. *Edgerton v. Johnson*, 218 N.C. 300, 10 S.E.2d 918 (1940). For note on this case, see 19 N.C.L. Rev. 227.

Plaintiff moved that the judgment rendered against him in this cause on de-

fendant's counterclaim should be offset by a judgment subsequently obtained by plaintiff against defendant in a separate action, contending that defendant is insolvent. Defendant demanded that the judgment rendered in his favor upon the counterclaim in this cause be allowed to him as his personal property exemption. It was held that to allow offset would amount to "final process" within the meaning of this section, and defendant's demand that the judgment in his favor on the counterclaim be allowed him as his personal property exemption precludes plaintiff's right of offset. *Edgerton v. Johnson*, 218 N.C. 300, 10 S.E.2d 918 (1940).

Exemption Ceases at Death of Claimant.—The personal property exemption provided for by this section and the laws passed pursuant thereto exists only during the life of the homesteader and after his death passes to his personal representative, to be disposed of in a due course of administration. *Johnson v. Cross*, 66 N.C. 167 (1872).

Forfeiture of Exemption.—A bankrupt who conceals assets exceeding in value his statutory exemption forfeits his right to such exemption. *Hyman v. Stern*, 43 F.2d 666 (4th Cir. 1930).

One who is a fugitive from justice, though leaving his family here, who cannot be found in the State and whose whereabouts are unknown, and the object of whose absence is to avoid serving a criminal sentence imposed by the courts, is not a resident of the State within the meaning of this section, of the Constitution, and not entitled to his exemptions here in the absence of evidence or finding on the question of his *animus revertendi*. *Cromer v. Self*, 149 N.C. 164, 62 S.E. 885, 128 Am. St. Rep. 658 (1908).

Sec. 2. Homestead exemptions.

(1) *Exemption from sale; exceptions.* Every homestead and the dwellings and buildings used therewith, to a value fixed by the General Assembly but not less than \$1,000, to be selected by the owner thereof, or in lieu thereof, at the option of the owner, any lot in a city or town with the dwellings and buildings used thereon, and to the same value, owned and occupied by a resident of the State, shall be exempt from sale under execution or other final process obtained on any debt. But no property shall be exempt from sale for taxes, or for payment of obligations contracted for its purchase.

(2) *Exemption for benefit of children.* The homestead, after the death of the owner thereof, shall be exempt from the payment of any debt during the minority of the owner's children, or any of them.

(3) *Exemption for benefit of widow.* If the owner of a homestead dies, leaving a widow but no children, the homestead shall be exempt from the debts of her husband, and the rents and profits thereof shall inure to her benefit during her widowhood, unless she is the owner of a homestead in her own right.

(4) *Conveyance of homestead.* Nothing contained in this Article shall operate to prevent the owner of a homestead from disposing of it by deed, but no deed made by the owner of a homestead shall be valid without the signature and acknowledgement of his wife.

- I. Exemption Generally.
- II. Exemption for Benefit of Children.
- III. Exemption for Benefit of Widow.
- IV. Conveyance of Homestead.

I. EXEMPTION GENERALLY.

Cross Reference.—For statutory provisions, see G.S. § 1-369 et seq. and the notes thereto.

Editor's Note.—The provisions of subsection (1) of this section are similar to those of Art. X, § 2, Const. 1868. The provisions of subsection (2) are similar to those of Art. X, § 3, Const. 1868. The provisions of subsection (3) are similar to those of Art. X, § 5, Const. 1868. The provisions of subsection (4) are similar to those of Art. X, § 8, Const. 1868, as amended in 1944. The cases in the following annotation were decided under the corresponding provisions of the Constitution of 1868.

For comment as to whether North Carolina really has a homestead exemption, see 2 Wake Forest Intra. L. Rev. 53 (1966).

A Constitutional Right.—The right to a homestead is guaranteed by the Constitution. *Williams v. Johnson*, 230 N.C. 338, 53 S.E.2d 277 (1949).

Homestead and Personal Property Exemptions Distinguished. — The homestead exemption is permanent unless there is a reallocation by reason of an increase in value in the manner provided by G.S. § 1-373. But the personal property exemption is to be reassigned, whenever, at subsequent dates, executions are levied. The reason is that the realty is fixed and stable, whereas the articles of personal property may be increased or diminished in quantity, between the levy of executions. *Gardner v. McConnaughey*, 157 N.C. 481, 73 S.E. 125 (1911).

In view of this section the doctrine of estoppel cannot deny a bankrupt his right to a homestead in lands which were subject to his debts. In selecting the land for his homestead exemption, he is not restricted to the tract on which he lives. In *re Hamrick*, 56 F.2d 240 (W.D.N.C. 1932).

The right to claim homestead may be lost by failure to assert it in apt time, by waiver, or by estoppel. *Cameron v. McDonald*, 216 N.C. 712, 6 S.E.2d 497 (1940).

Homestead is a right created for the benefit of the judgment debtor, and therefore other judgment creditors cannot complain of a waiver by the debtor of this

right in designated realty as to a particular judgment. *North Carolina Joint Stock Land Bank v. Bland*, 231 N.C. 26, 56 S.E.2d 30 (1949).

A written request by judgment debtors to the sheriff to sell lands under execution without the allotment of homestead to the end that the property might bring the highest price possible, and the joinder of the judgment debtors in the sheriff's deed to the purchaser, constitute an authorization and ratification of the act of the sheriff in making the execution sale without allotment of homestead and is a valid waiver by the judgment debtors of their homestead exemption in regard to that particular execution. *North Carolina Joint Stock Land Bank v. Bland*, 231 N.C. 26, 56 S.E.2d 30 (1949).

Right May Be Sold or Assigned.—The homestead right or estate is salable or assignable, and the purchaser can hold the land to which it pertains to the exclusion of judgment creditors during its existence. *Gardner v. Batts*, 114 N.C. 496, 19 S.E. 794 (1894).

Where there is a homestead right in land, the homesteader may alienate the same only with the joinder of the wife. *Farris v. Hendricks*, 196 N.C. 439, 146 S.E. 73 (1929).

The owner of lands loses his right to a homestead therein allowed by this section upon his conveying the title to the same, by deed, though he may select a homestead thereafter in other of his lands under the provisions of G.S. § 1-370. *Duplin County v. Harrell*, 195 N.C. 445, 142 S.E. 481 (1928).

Only Residents Entitled to Homestead. — Evidence held insufficient to support finding by the court that judgment debtor was resident and entitled to homestead. *S.D. Scott & Co. v. Jones*, 230 N.C. 74, 52 S.E.2d 219 (1949).

Duration of Homestead. — The homestead as allowed lasts during the life of the owner thereof; and, after his death, it lasts during the minority of his children, or any one of them, and the widowhood of his widow, unless she be the owner of a homestead in her own right. *Williams v. Johnson*, 230 N.C. 338, 53 S.E.2d 277 (1949).

Presumption of Continuance.—Once acquired the homestead is presumed to continue. *Williams v. Johnson*, 230 N.C. 338, 53 S.E.2d 277 (1949).

Allotment Unnecessary. — The title to the homestead is vested in the owner by the Constitution of this State, and no allotment by the sheriff is necessary to vest the title thereto. The allotment by the sheriff is only for the purpose of ascertaining whether there be an excess of property over the homestead which is subject to execution. *Lambert v. Kinnery*, 74 N.C. 348 (1876). See note to G.S. § 1-369.

Land must be selected by the owner and allotted before it becomes exempt. It must also be both owned and occupied by the homesteader, and this at the time of issuance of the execution. *Chadbourn Sash, Door & Blind Co. v. Parker*, 153 N.C. 130, 69 S.E. 1 (1910).

Where a judgment debtor is present when his homestead in his land is laid off to him by the appraisers and designates the land he desires for the purpose, he may not successfully contend thereafter that other lands should have been included, it not being contended that the value of the homestead as allotted was less than one thousand dollars. *Citizens Bank v. Robinson*, 201 N.C. 796, 161 S.E. 487 (1931).

Where a mortgage on land is foreclosed and the land brings at the foreclosure sale a sum more than sufficient to pay the mortgage debt, the surplus remaining to the constitutional limit of one thousand dollars is to be regarded as realty to which the homestead right attaches when the same has not been waived. *Farris v. Hendricks*, 196 N.C. 439, 146 S.E. 73 (1929).

A mortgagor of lands is entitled to his homestead exemption in his equity of redemption as against the liens of judgment creditors, and an injunction will lie against the sale of the property under execution when his homestead has not been allotted. *Cheek v. Walden*, 195 N.C. 752, 143 S.E. 465 (1928).

There is no lien for purchase money in North Carolina, and while the judgment debtor cannot claim homestead as against a judgment for purchase money, the lien of a mortgage executed to a third person has priority over the judgment lien, when the mortgage is executed prior to the rendition of the judgment and prior to an amendment putting the title to the property in issue. *Jarrett v. Holland*, 213 N.C. 428, 196 S.E. 314 (1938).

A duly docketed judgment is a lien on the lands of the judgment debtor but is subject to the homestead interest in the lands as provided by this section. *Farris v. Hendricks*, 196 N.C. 439, 146 S.E. 73 (1929).

The only way property may lose its homestead character, after the homestead has been allotted, is by death, abandonment or alienation. *Williams v. Johnson*, 230 N.C. 338, 53 S.E.2d 277 (1949).

Homestead interest in land is terminated by the owner's removal from the State. *S.D. Scott & Co. v. Jones*, 230 N.C. 74, 52 S.E.2d 219 (1949).

The right to the homestead exemption is not forfeited by a fraudulent conveyance, and a judgment was properly modified by order directing that defendant be allotted his homestead in the land, which should be exempt from sale by the commissioner. *New Amsterdam Cas. Co. v. Dunn*, 209 N.C. 736, 184 S.E. 488 (1936).

Exemption Allowed in Mortgaged Lands. — A debtor may have his homestead exemption allotted in lands owned by him but mortgaged to a third person, but in ascertaining the value thereof the mortgage debt should be disregarded, and the land appraised as though the debtor owned the unencumbered fee. *Crow v. Morgan*, 210 N.C. 153, 185 S.E. 668 (1936).

Or Vacant Lots. — Where the only real property owned by a judgment debtor consists of vacant lots, he may claim his homestead therein, since he may thereafter build an habitable structure thereon. *Equitable Life Assurance Soc'y v. Russos*, 210 N.C. 121, 185 S.E. 632 (1936).

II. EXEMPTION FOR BENEFIT OF CHILDREN.

Editor's Note. — It is to be noted that the widow's right to the homestead provided for by subsection (3) of this section is expressly conditioned upon her not being the owner of a homestead in her own right. Such a clause is not contained in subsection (2), which gives the right to the children during minority. On this point it was said in *Spence v. Goodwin*, 128 N.C. 273, 38 S.E. 859 (1901): "This . . . emphasizes by direct implication the unconditional right of exemption given to the children by [subsection (2)]."

Only Minor Children Included. — An heir twenty-one years old is not entitled to homestead in the lands of his ancestor; his right thereto ceased as soon as he attained his majority. *Saylor v. Powell*, 90 N.C. 202 (1884).

Where Only One Child a Minor. — Where the owner of a homestead dies, leaving children, some of age and one a minor, the homestead estate vests alone in the minor child until his or her majority. *Simpson v. Wallace*, 83 N.C. 477 (1880).

Pecuniary Standing of Children Not Considered. — The right to a homestead is

given to the minor children of a insolvent father, regardless of their pecuniary circumstances. *Allen v. Shields*, 72 N.C. 504 (1875); *Spence v. Goodwin*, 128 N.C. 273, 38 S.E. 859 (1901).

Right Not Waivable by Guardian Ad Litem.—A guardian ad litem cannot waive the homestead rights of infant heirs, especially when there is no consideration therefor, for such waiver would affect the substantial rights of the infants. *Spence v. Goodwin*, 128 N.C. 273, 38 S.E. 859 (1901).

The debt referred to in this section means the debt of the owner of the homestead, and not the debt of the infant children. *Bruton v. McRae*, 125 N.C. 206, 34 S.E. 397 (1899).

Right Not to Be Sold for Assets. — In a proceeding to sell land for assets, the executor cannot sell the homestead interest of a minor child and devisee of the testator. *Bruton v. McRae*, 125 N.C. 206, 34 S.E. 397 (1899).

III. EXEMPTION FOR BENEFIT OF WIDOW.

Cross References. — See G.S. § 1-369, analysis line "Who Entitled to Homestead and Exemptions," IV, B. As to allotment after death of homesteader, see § 1-389 and note thereto.

Ownership at Death Essential. — It is only in the contingency that the husband is the owner of a homestead at the time of his death that the exemption from debts inures to her benefit. *Thomas v. Bunch*, 158 N.C. 175, 73 S.E. 899 (1912).

A widow is not required to take action for the preservation of the right to a homestead in the lands of her deceased husband under the provisions of this section, and before the land can be validly sold by the personal representatives to make assets for payment of the debts of the deceased the homestead must first be assigned. *Fulp v. Brown*, 153 N.C. 531, 69 S.E. 612 (1910).

Heirs Prior to Widow Where There Are No Creditors.—A widow is not entitled to homestead against the heirs at law where there are no creditors, but only to dower. *Caudle v. Morris*, 160 N.C. 168, 76 S.E. 17 (1912). See also *Tucker v. Tucker*, 103 N.C. 170, 9 S.E. 299 (1889).

Widow Not Entitled to Homestead Where Husband Left Adult Children by Another Marriage.—The widow by a second marriage of one who died seized and possessed of land leaving no children by her, is not entitled to the benefit of a homestead therein, when he has left children by his first marriage, though they are adult. The meaning of the language of

subsections (2) and (3) of this section is too plain for construction, that in speaking of children the instrument refers to children of the deceased owner. *Simmons v. Respass*, 151 N.C. 5, 65 S.E. 516 (1909).

IV. CONVEYANCE OF HOMESTEAD.

Cross Reference.—As to conveyances by husband and wife, see G.S. § 39-7 et seq. and notes thereto.

Editor's Note.—For a review of the decisions prior and subsequent to the enactment, in 1905, of what is now G.S. § 1-370, see *Stokes v. Smith*, 246 N.C. 694, 100 S.E.2d 85 (1957).

General Rule.—A deed executed by the homesteader without the joinder of his wife is invalid and passes no interest. *Wittkowsky v. Gidney*, 124 N.C. 437, 32 S.E. 731 (1899). See *Lambert v. Kinnery*, 74 N.C. 348 (1876).

Subsection (4) Applies After Allotment of Homestead.—Subsection (4) of this section applies only to a conveyance of the homestead after it has been laid off. *Mayho v. Cotton*, 69 N.C. 289 (1873), approved in *Dalrymple v. Cole*, 170 N.C. 102, 86 S.E. 988 (1915). See also *Hager v. Nixon*, 69 N.C. 108 (1873).

The provisions of subsection (4) of this section do not become effective, and do not begin to operate until an allotment of the homestead is made to the husband. *Dalrymple v. Cole*, 170 N.C. 102, 86 S.E. 988 (1915).

Right of Grantee upon Nonjointure of Wife.—Where a husband conveys his land without having his wife join in the deed, the grantee acquires the land free from the right of the wife to a homestead, unless the same has been laid off therein to the husband, but subject to the wife's right of dower, should she survive him. *Dalrymple v. Cole*, 170 N.C. 102, 86 S.E. 988 (1915). For other enumerated instances wherein the assent of the wife is not necessary, see note of *Hughes v. Hodges*, 102 N.C. 236, 9 S.E. 437 (1889), under G.S. § 39-9. See also *Dalrymple v. Cole*, 156 N.C. 353, 72 S.E. 451 (1911); *Simmons v. McCullin*, 163 N.C. 409, 79 S.E. 625 (1913).

Jointure of Wife Unnecessary in Conveyance of Estate in Reversion.—A married woman has no interest or estate in the reversion which takes effect after a homestead estate; therefore the assent of the wife is not necessary to give validity to a deed of the husband conveying such estate in reversion. *Jenkins v. Bobbitt*, 77 N.C. 385 (1877).

Or Conveyance of Residue over Homestead Exemption.—The general power of alienation incident to ordinary ownership

of real property exists as to all the residue or remaining interest in the lands over the homestead exemption, whether the exemption has or has not been allotted, this section of the Constitution applying alone to the homestead interest, and none other. *Davenport v. Fleming*, 154 N.C. 291, 70 S.E. 472 (1911).

Sec. 3. *Mechanics' and laborers' liens.* The General Assembly shall provide by proper legislation for giving to mechanics and laborers an adequate lien on the subject-matter of their labor. The provisions of Sections 1 and 2 of this Article shall not be so construed as to prevent a laborer's lien for work done and performed for the person claiming the exemption or a mechanic's lien for work done on the premises.

Cross Reference.—For statutory provisions as to laborers' and mechanics' liens, see G.S. § 44A-1 et seq. and the notes thereto.

Editor's Note.—The provisions of the first sentence of this section are similar to those of Art. XIV, § 4, Const. 1868. The provisions of the second sentence of this section are similar to those of Art. X, § 4, Const. 1868. The cases in the following annotation were decided under those sections.

Definition of Terms.—A "laborer's lien" is solely for labor performed, while a "mechanic's lien" is broader and includes the "work done," i.e., the "building built" or superstructure put on the premises. *Broyhill v. Gaither*, 119 N.C. 443, 26 S.E. 31 (1896).

This section is a mandate directing the General Assembly to enact legislation to give mechanics and laborers a lien on the

Land Acquired Prior to 1868.—The husband may convey land acquired before the Constitution of 1868 without the joinder of the wife and thereby bar the wife of dower or homestead. *Cawfield v. Owens*, 129 N.C. 286, 40 S.E. 62 (1901).

subject matter of their labor. *American Bridge Div., United States Steel Corp. v. Brinkley*, 255 N.C. 162, 120 S.E.2d 529 (1961).

Liens on Public Construction Prohibited.—Public policy prohibits the acquisition of liens for labor or materials used or furnished in the construction of a public edifice or way. *American Bridge Div., United States Steel Corp. v. Brinkley*, 255 N.C. 162, 120 S.E.2d 529 (1961).

Lien for Materials Furnished.—See *Cumming v. Bloodworth*, 87 N.C. 83 (1882); *Broyhill v. Gaither*, 119 N.C. 443, 26 S.E. 31 (1896).

Lien on Property of Married Woman.—For all debts contracted for work and labor done, a lien is given upon the property of a married woman. *Ball v. Paquin*, 140 N.C. 83, 52 S.E. 410, 3 L.R.A. (n.s.) 307 (1905).

Sec. 4. *Property of married women secured to them.* The real and personal property of any female in this State acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations, or engagements of her husband, and may be devised and bequeathed and conveyed by her, subject to such regulations and limitations as the General Assembly may prescribe. Every married woman may exercise powers of attorney conferred upon her by her husband, including the power to execute and acknowledge deeds to property owned by herself and her husband or by her husband.

Cross References.—As to conveyances by husband and wife, see G.S. § 39-7 et seq. and the notes thereto. As to powers and liabilities of married persons, see G.S. § 52-1 et seq. and the notes thereto.

Editor's Note.—The provisions of this section are similar to those of Art. X, § 6, Const. 1868, as amended in 1956 and 1964, and the cases in the following annotation were decided under that section.

For note on wife's conveyance of her realty by virtue of husband's power of attorney, see 31 N.C.L. Rev. 228 (1953).

For note on constitutionality of husband's right to dissent from wife's will, see 41 N.C.L. Rev. 311 (1963).

For comment as to whether North Carolina really has a homestead exemption, see 2 Wake Forest Intra. L. Rev. 53 (1966).

General Policy of Section.—This section is intended to emancipate married women and place them, so far as property rights are concerned, on a par with men and femmes sole. *McLeod v. Williams*, 122 N.C. 451, 30 S.E. 129 (1898).

There is no "beneficent provision of the

Constitution" which throws additional shackles around women in the management of their separate property. The provision of the Constitution is in exactly the opposite direction, in accordance with the free spirit of the age and with the universal trend of legislation the world over. Its purpose is not to further assimilate married women to the condition of infants, but to make free women of them, to emancipate them from most of the restrictions formerly existing. *Strouse v. Cohen*, 113 N.C. 349, 18 S.E. 323 (1893).

History of Section. — See *Perry v. Stancil*, 237 N.C. 442, 75 S.E.2d 512 (1953).

Common-Law Rule Changed. — The common-law rule giving to the husband the actual or potential ownership of the separate choses in action belonging to his wife by reducing them into possession is now changed by this section giving to the wife the sole ownership of her separate estate. *Turlington v. Lucas*, 186 N.C. 283, 119 S.E. 366 (1923).

In *Etheredge v. Cochran*, 196 N.C. 681, 146 S.E. 711 (1929), referring to this section, it is said: "By virtue of these and other provisions the relation which married women formerly sustained to their husbands has been materially modified. Unity of person in the strict common-law sense no longer exists, and many of the common-law disabilities have been removed. Not only may they contract with each other; a married woman may now sue her husband in contract or in tort. *Dorsett v. Dorsett*, 183 N.C. 354, 111 S.E. 541, 23 A.L.R. 15 (1922); *Roberts v. Roberts*, 185 N.C. 566, 118 S.E. 9, 29 A.L.R. 1479 (1923)." *Shirley v. Ayers*, 201 N.C. 51, 158 S.E. 840 (1931).

This section completely abolished the general doctrine of the common law that as to property husband and wife are in legal contemplation but one person, and the husband is that one, and made very material and far-reaching changes as to the rights respectively of husband and wife in respect to her property, both real and personal and enlarged her power in respect to and control over her property. *Dudley v. Staton*, 257 N.C. 572, 126 S.E.2d 590 (1962), commented on in 41 N.C.L. Rev. 311 (1963).

Purpose of 1964 Amendment.—The 1964 amendment to this section was enacted to abrogate the effect of the decision in *Dudley v. Staton*, 257 N.C. 572, 126 S.E.2d 590 (1962) and to make the rights of husbands and wives the same in each other's separate property. *Fullam v. Brock*, 271 N.C. 145, 155 S.E.2d 737 (1967).

Legislative Power to Declare Wife Free Trader.—There is no constitutional inhibition on the power of the legislature to declare where and how the wife may become a free trader, this section being intended to protect instead of disabling her. *Hall v. Walker*, 118 N.C. 377, 24 S.E. 6 (1896); *Dudley v. Staton*, 257 N.C. 572, 126 S.E.2d 590 (1962), commented on in 41 N.C.L. Rev. 311 (1963).

Statutes Allowing Husband to Dissent from Wife's Will Violated Section Prior to 1964 Amendment.—See *Dudley v. Staton*, 257 N.C. 572, 126 S.E.2d 590 (1962), commented on in 41 N.C.L. Rev. 311 (1963); *Fullam v. Brock*, 271 N.C. 145, 155 S.E.2d 737 (1967).

And Wife Could Bar Husband's Curtesy by Devising Property.—By marriage, before the adoption of the Constitution of 1868, the husband acquired no vested rights in the lands of his wife before a child was born capable of inheriting; and when the first child born of the marriage was after the adoption of the Constitution of 1868, which gave a married woman the power, among other things, of disposing, by will, of her property acquired before marriage, she could accordingly dispose of it by will and deprive him of his interest therein as tenant by the curtesy. *Richardson v. Richardson*, 150 N.C. 549, 64 S.E. 510 (1909).

Where a feme covert died intestate her husband was entitled to his common-law right of curtesy; where she devised her land, under Art. X, § 6, Const. 1868, the estate of curtesy was destroyed. *Tiddy v. Graves*, 126 N.C. 620, 36 S.E. 127 (1900).

In *Tiddy v. Graves*, 126 N.C. 620, 36 S.E. 127 (1900); *Tiddy v. Graves*, 127 N.C. 502, 37 S.E. 513 (1900), the Supreme Court held, inter alia, that "it is clear that under the present Constitution there is no curtesy after the death of the wife in property which she has devised." *Dudley v. Staton*, 257 N.C. 572, 126 S.E.2d 590 (1962), commented on in 41 N.C.L. Rev. 311 (1963).

In *Walker v. Long*, 109 N.C. 510, 14 S.E. 299 (1890), the Supreme Court held, inter alia, that the common-law estate of the husband as tenant by the curtesy initiate in the lands of his wife was abolished by Art. X, § 6, Const. 1868. *Dudley v. Staton*, 257 N.C. 572, 126 S.E.2d 590 (1962), commented on in 41 N.C.L. Rev. 311 (1963).

Vested curtesy rights of the husband at the time of the adoption of the Constitution of 1868 were not impaired. *Richardson v. Richardson*, 150 N.C. 549, 64 S.E. 510 (1909).

But Amendment Restored Husband's Right to Dissent.—The effect of the adoption by the voters of the 1964 amendment to this section was to restore, subject to the qualifications set forth in Session Laws 1963, c. 1209, the right of the husband to dissent from the will of his wife. *Fullam v. Brock*, 271 N.C. 145, 155 S.E.2d 737 (1967).

And Dissent Could Be Based on Anticipatory Legislation Prior to Amendment.—Where, at the time of his wife's death in 1965, the amendment to this section authorizing the legislature to empower a husband to dissent from his wife's will had been certified but the legislation reenacting G.S. §§ 30-1, 30-2, and 30-3 had not become effective, the husband had a right to dissent from his wife's will based on anticipatory provisions of Session Laws 1963, c. 1209, which directed the submission of the constitutional amendment, and which provided that the word "spouse" should apply to both husband and wife in certain statutes. *Fullam v. Brock*, 271 N.C. 145, 155 S.E.2d 737 (1967).

Legislative Control over Capacity to Make Will.—This section conferring upon married women the right to make a will, etc., was designed chiefly to remove the common-law restriction on married women in this respect, and was not intended to free such right from every and all legislative regulation. *Flanner v. Flanner*, 160 N.C. 126, 75 S.E. 936 (1912).

Liability of Husband for Rents Paid Wife after Foreclosure.—Where lands belonging to the separate estate of a wife have been foreclosed under a deed of trust thereon duly executed, and after such foreclosure the rents from the land are paid to the wife, the husband may not be held responsible for such rents by the person entitled to the rent by virtue of the foreclosure, since, under this section a wife is given sole ownership of her separate estate. *In re Longley*, 205 N.C. 488, 171 S.E. 788 (1933).

Trust for sole use and benefit of married woman held passive, in view of this section. *Pilkington v. West*, 246 N.C. 575, 99 S.E.2d 798 (1957).

Devise of Equitable Separate Estate.—A married woman may devise her equitable separate estate, in the absence of contrary provisions in the instrument creating it, where the trustee is a passive trustee; and, whether the trust be passive or active, where the trust is to terminate with her life, and the estate to become absolute thereafter. *Freeman v. Lide*, 176 N.C. 434, 97 S.E. 402 (1918).

Provisions of Instrument Creating Estate Still Control.—Married women have no greater estates, by operation of this section of the Constitution, than those conveyed by the terms of the deed under which they derive title; nor are the properties and incidents belonging to estates changed by that instrument. *Long v. Barnes*, 87 N.C. 329 (1882).

The Constitution imposes no limitation upon the right of a grantor or deviser to restrict or enlarge, by the terms of the instrument through which title passes, her *jus disponendi*. *Kirby v. Boyette*, 118 N.C. 244, 24 S.E. 18 (1896).

Marriage Does Not Sever Unity of Title and Possession under Joint Tenancy.—Where a deed of bargain and sale conveys a joint tenancy in the grantees with right of survivorship, the subsequent marriage of one of the grantees does not sever the unity of title and possession. *Vettori v. Fay*, 262 N.C. 481, 137 S.E.2d 810 (1964).

Estates by entireties are not changed or affected by this section of the Constitution as to rights of married women. *Moore v. Shore*, 208 N.C. 446, 181 S.E. 275 (1935), citing *Bank of Greenville v. Gornto*, 161 N.C. 341, 77 S.E. 222 (1913).

Estates by entireties as between husband and wife still exist in North Carolina, but where there is a judgment upon a joint contract against husband and wife, a lien thereunder is created against lands held by them in entireties, and execution may be issued against them. *Martin v. Lewis*, 187 N.C. 473, 122 S.E. 180 (1924).

The husband has the right, during coverture, to deal with the possession of land held by him and his wife by entireties without the consent of the wife, but neither may make a contract affecting title so as to defeat the right of the survivor in the whole estate without the consent of the other. *Moore v. Shore*, 208 N.C. 446, 181 S.E. 275 (1935).

Where lots are conveyed with restrictive covenants limiting buildings to residences and one of such lots is owned by a husband and wife by the entireties, the husband may not convey or contract in respect to the negative easement of such lot over the other lots without the consent of his wife, since the wife has the right to such negative easement as a part of the estate if she should survive her husband. *Moore v. Shore*, 208 N.C. 446, 181 S.E. 275 (1935).

Section Not Applicable to Obligations of Wife as Surety to Her Husband.—This section, providing that the separate property of the wife shall not be liable for the debts of the husband, has no application to

the obligation of the wife as surety of her husband, such obligation being regarded as a direct one between the creditor and herself. *Royal v. Southerland*, 168 N.C. 405, 84 S.E. 708 (1915).

Action for Tort.—The husband cannot sue to recover his wife's earnings, or damages for torts committed on her, and there is no reason why she can sue for torts or injuries inflicted on her husband. The law has never authorized the wife to maintain such action for torts sustained by the husband. If the husband could maintain an action to recover damages for torts on the wife she would be able to maintain an action on account of torts sustained by the husband. Such right of action if it existed in favor of the husband should exist in favor of the wife. It should be in favor of both, or neither, but in view of the Constitution of 1868 and the statute on the subject, such action cannot be maintained by either on account of the injury to the other. *Hipp v. E.L. Dupont de Nemours & Co.*, 182 N.C. 9, 108 S.E. 318 (1921).

The right of a married woman to maintain an action against her husband to recover for negligent injury is not limited to residents of this State, but a nonresident wife may maintain an action here against her nonresident husband on a transitory cause of action which arises in this State, and she is entitled to any recovery as her separate property. *Bogen v. Bogen*, 219 N.C. 51, 12 S.E.2d 649 (1941).

Statute providing that earnings and damages from personal injury are wife's property (G.S. § 52-4) should be read in the light of this section. *Helmstetler v. Duke Power Co.*, 224 N.C. 821, 32 S.E.2d 611 (1945).

Power to Contract by Virtue of This Section.—Where it was contended that when the Constitution gave married women separate estates in their property, it gave them by a necessary implication an unrestricted dominion over the property, to bind it directly or indirectly, except when expressly forbidden, and an unrestricted right to contract, such as a feme sole or a man has, it was held that there was no such grant implied, that the terms "sole and separate estate" had a known and definite meaning in the law when the Constitution was framed, and that it must be taken that they were used in that instrument in

the sense which had been affixed to them by prior decisions of the court. *Pippen v. Wesson*, 74 N.C. 437 (1876). But this power is now expressly accorded to married women by the terms of statute known as Martin Act embodied in G.S. § 52-2.—Ed. note.

Husband a Freeholder Where Wife Owns Land and There Are Children.—In *Hodgin v. Southern R.R.*, 143 N.C. 93, 55 S.E. 413 (1906), it is said: "One of the jurors was challenged by defendant upon the ground that he was not a freeholder. The challenge was allowed and plaintiff excepted. The juror owned no land, but his wife was seized of a fee and had children by her husband. While the Constitution, Art. X, § 6 [this section], has wrought very material and far-reaching changes as to the rights and dominion of the wife over her separate property, it seems, nevertheless, to have been held by this court that the husband still has what is termed an 'interest' in her land which constitutes him technically a freeholder." *State v. Avant*, 202 N.C. 680, 163 S.E. 806 (1932).

Conveyances between Husband and Wife.—A deed executed by husband to wife in 1841, even if a fee simple deed, would have been void in law, and sustainable in equity only upon meritorious consideration; it is otherwise, as to such deed executed now, which is rendered valid under this section. *McLamb v. McPhail*, 126 N.C. 218, 35 S.E. 426 (1900).

Former Requirement of Husband's Written Assent to Wife's Conveyance.—See *Jennings v. Hinton*, 126 N.C. 48, 35 S.E. 187 (1900); *Coffin v. Smith*, 128 N.C. 252, 38 S.E. 864 (1901); *Vann v. Edwards*, 135 N.C. 661, 47 S.E. 784 (1904); *Smith v. Bruton*, 137 N.C. 79, 49 S.E. 64 (1904); *Freeman v. Lide*, 176 N.C. 434, 97 S.E. 402 (1918); *Joiner v. Firemen's Ins. Co.*, 6 F. Supp. 103 (M.D.N.C. 1934); *Martin v. Bundy*, 212 N.C. 437, 193 S.E. 831 (1937); *Nichols v. York*, 219 N.C. 262, 13 S.E.2d 565 (1941); *Buford v. Mochy*, 224 N.C. 235, 29 S.E.2d 729 (1944); *Perkins v. Isley*, 224 N.C. 793, 32 S.E.2d 588 (1945); *Merchants & Farmers Bank v. Sherrill*, 231 N.C. 731, 58 S.E.2d 741 (1950); *Perry v. Stancil*, 237 N.C. 442, 75 S.E.2d 512 (1953); *Dudley v. Staton*, 257 N.C. 572, 126 S.E.2d 590 (1962), commented on in 41 N.C.L. Rev. 311 (1963).

Sec. 5. Insurance. The husband may insure his own life for the sole use and benefit of his wife or children or both, and upon his death the proceeds from the insurance shall be paid to or for the benefit of the wife or children or both, or to a guardian, free from all claims of the representatives or creditors of the insured or his estate. Any insurance policy which insures the life of a husband for the sole

use and benefit of his wife or children or both shall not be subject to the claims of creditors of the insured during his lifetime, whether or not the policy reserves to the insured during his lifetime any or all rights provided for by the policy and whether or not the policy proceeds are payable to the estate of the insured in the event the beneficiary or beneficiaries predecease the insured.

Editor's Note.—The provisions of this section are similar to those of Art. X, § 7, Const. 1868, as amended in 1932, and the cases in the following annotation were decided under that section.

Generally.—This section clearly looks to the provision for the wife and children so that they may not be left destitute by the death of an insolvent husband and father, and is personal to them when they survive. *Hooker v. Sugg*, 102 N.C. 115, 8 S.E. 919 (1889).

The purpose is to enable the husband to make valuable provision for his wife and children after his death, above, beyond and unaffected by his estate, personal and real, and the conditions of the same remaining at the time of his death. *Burwell v. Snow*, 107 N.C. 82, 11 S.E. 1090 (1890).

Not a Part of Insured's Estate.—Where a life insurance policy is issued to one in the name and for the benefit of the wife

and children it does not upon his death become a part of his estate. *Burton v. Farinholt*, 86 N.C. 260 (1882). See also the discussion of this point contained in *Herring v. Sutton*, 129 N.C. 107, 39 S.E. 772 (1901) (dissenting opinion).

Under this section the proceeds from the insurance policy payable to the wife and children are not a part of the insured's estate so that they may be claimed by an heir or next of kin. *Burwell v. Snow*, 107 N.C. 82, 11 S.E. 1090 (1890).

Life Policy of Bankrupt Is Protected from Creditors if Wives and Children Are Sole Beneficiaries.—Wives and children of bankrupts are protected from claims of the bankrupt's creditors, both during his life and at his death, if life policies are for their sole benefit. *In re Wolfe*, 249 F. Supp. 784 (M.D.N.C. 1966), commented on in 45 N.C.L. Rev. 696 (1967).

ARTICLE XI

PUNISHMENTS, CORRECTIONS, AND CHARITIES

Section 1. *Punishments.* The following punishments only shall be known to the laws of this State: death, imprisonment, fines, removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under this State.

Editor's Note.—The provisions of this section are similar to those of the first sentence of Art. XI, § 1, Const. 1868, as amended by the Convention of 1875, and the cases in the following annotation were decided under that section.

For article on punishment for crime in North Carolina, see 17 N.C.L. Rev. 205.

Article Confers Plenary Authority on General Assembly.—Under the provisions of this article the General Assembly has plenary authority to provide for a State prison system. *Pharr v. Garibaldi*, 252 N.C. 803, 115 S.E.2d 18 (1960).

The courts may impose only such punishments as are authorized by this section. *State v. Cole*, 241 N.C. 576, 86 S.E.2d 203 (1955).

The Constitution forbids both ignominious burial and forfeiture of estates as punishment for crime. *State v. Willis*, 255 N.C. 473, 121 S.E.2d 854 (1961).

Thus, suicide may not be punished in North Carolina. *State v. Willis*, 255 N.C. 473, 121 S.E.2d 854 (1961).

But the criminal character of the act of

suicide is not changed. *State v. Willis*, 255 N.C. 473, 121 S.E.2d 854 (1961).

The Constitution and statutes have repealed and abrogated the common law as to suicide only as to punishment and possibly the quality of the offense. *State v. Willis*, 255 N.C. 473, 121 S.E.2d 854 (1961).

And an attempt to commit suicide is an indictable misdemeanor in this State. *State v. Willis*, 255 N.C. 473, 121 S.E.2d 854 (1961).

Working Convicts—Section Not Basis of Disciplinary Rules.—This constitutional provision has no direct application to the discipline required in jails and penitentiaries, for if so it would prevent solitary confinement, restriction of rations, and other reasonable punishments that are in customary use in prisons and penitentiaries. *State v. Nipper*, 166 N.C. 272, 81 S.E. 164 (1914). But officers are civilly and criminally liable for an abuse or oppression of the adopted regulations under which the convicts are kept. *State v. Young*, 138 N.C. 571, 50 S.E. 213 (1905).

Same—Regulations Must Be Reasonable.—Whether the prisoners are worked on the public road or kept in jail the regulations

under which they must live must be reasonable. *State v. Young*, 138 N.C. 571, 50 S.E. 213 (1905).

Sec. 2. *Death punishment.* The object of punishments being not only to satisfy justice, but also to reform the offender and thus prevent crime, murder, arson, burglary, and rape, and these only, may be punishable with death, if the General Assembly shall so enact.

Cross references.—As to punishment for murder, see G.S. § 14-17 and note thereto; as to punishment for arson, see § 14-58 and note thereto; as to burning of buildings other than dwelling houses, see § 14-59 et seq. and notes thereto; as to punishment for burglary, see § 14-52 and note thereto; as to punishment for rape, see § 14-21 and note thereto.

Editor's Note.—The provisions of this section are similar to those of Art. XI, § 2, Const. 1868, and the cases in the following annotation were decided under that section.

Power of Legislature.—The punishment to be inflicted for any crime is left entirely to the General Assembly, which can in its discretion affix lesser punishments, even for the four crimes, mentioned in this sec-

Sec. 3. *Charitable and correctional institutions and agencies.* Such charitable, benevolent, penal, and correctional institutions and agencies as the needs of humanity and the public good may require shall be established and operated by the State under such organization and in such manner as the General Assembly may prescribe.

Editor's Note.—This section is new with the Constitution of 1970.

Sec. 4. *Welfare policy; board of public welfare.* Beneficent provision for the poor, the unfortunate, and the orphan is one of the first duties of a civilized and a Christian state. Therefore the General Assembly shall provide for and define the duties of a board of public welfare.

Editor's Note.—The provisions of this section are similar to those of Art. XI, § 7, Const. 1868, and the cases in the following annotation were decided under that section.

Care of Indigent Sick Is Proper Function of State Government.—In accordance with express constitutional declaration of this section, the care of the indigent sick and afflicted poor is a proper function of the State government, and the General Assembly may by statute require the counties, as administrative agencies of the State, to perform this function, at least within their territorial limits. *Martin v. Board of Comm'rs*, 208 N.C. 354, 180 S.E. 777 (1935).

The obligation to pay the cost of medical care of the indigent sick and afflicted poor rests, under this section, upon the State. *Board of Managers of James Walker Mem. Hosp. v. City of Wilmington*, 237 N.C. 179, 74 S.E.2d 749 (1953).

tion, which are now visited with capital punishment. *State v. Lytle*, 138 N.C. 738, 51 S.E. 66 (1905).

The imposition of the death penalty upon a conviction of murder is expressly authorized by this section. *State v. Atkinson*, 275 N.C. 28, 167 S.E.2d 241 (1969).

Imposition of death penalty upon conviction of crime of rape is not unconstitutional per se. Being specifically authorized both by the Constitution of this State and by statute, it is not cruel and unusual punishment in the constitutional sense. *State v. Yoes*, 271 N.C. 616, 157 S.E.2d 386 (1967).

Statute Prescribing Punishment of Death for Burning Millhouse.—See *State v. King*, 69 N.C. 419 (1873).

The General Assembly may by statute delegate a portion of its sovereignty to the governing body of any town or city or county, separately or jointly, who, when they deem it for the best interest of the town or city or county, can contract with hospitals for the medical treatment and hospitalization of the sick and afflicted poor of the town or city or county within their territorial limits. The General Assembly has enacted such a law for towns and counties, G.S. § 160-229, and a similar law for counties, § 153-152. *Board of Managers of James Walker Mem. Hosp. v. City of Wilmington*, 237 N.C. 179, 74 S.E.2d 749 (1953).

There is no contractual duty on the part of the State to care for and maintain insane persons, the State hospitals being charitable institutions of the State, maintained voluntarily in recognition of Christian principles, as set out in this section. See G.S. § 143-120 et seq. *State ex rel.*

State Hosp. v. Security Nat'l Bank, 207 N.C. 697, 178 S.E. 487 (1935).

Erection of County Home and Issuing Bonds Therefor.—The building of a county home is for a class of citizens without a place of residence, and beneficent provision for whom is recommended by this section, "as one of the first duties of a civilized and a Christian State"; therefore, providing for such a home being included in the idea of their support, a county may pledge its

faith and credit and issue valid bonds for that purpose, as a necessary expense, without the approval of its voters. Board of Comm'rs v. Sidney Spitzer & Co., 173 N.C. 147, 91 S.E. 707 (1917).

Under this section a county may build a county home for the poor as a necessary expense without the approval of the voters. Board of Managers of James Walker Mem. Hosp. v. City of Wilmington, 237 N.C. 179, 74 S.E.2d 749 (1953).

ARTICLE XII MILITARY FORCES

Section 1. *Governor is Commander in Chief.* The Governor shall be Commander in Chief of the military forces of the State and may call out those forces to execute the law, suppress riots and insurrections, and repel invasion.

Editor's Note.—The provisions of this section are similar to those of Art. XII, § 3, Const. 1868, and the cases in the following annotation were decided under that section.

Governor May Call Out Militia.—In the absence of legislation, the Governor, as commander-in-chief, has the power to call out the militia, and the State guard being made a part of the militia, he has the power to call them out. This constitutional power may be regulated by legislation providing what shall amount to sufficient evidence of the existence of the

causes mentioned in this section of the Constitution. *Worth v. Commissioners of Craven County*, 118 N.C. 112, 24 S.E. 778 (1896).

Officers in the militia are liable to be called out to suppress riots or insurrection, "and to repel invasion." *In re Yelton*, 223 N.C. 845, 28 S.E.2d 567 (1944).

Same—Not Subject to Legislative Restriction.—The legislature has no authority to restrict the power of the Governor to call out the militia. *Worth v. Commissioners of Craven County*, 118 N.C. 112, 24 S.E. 778 (1896).

ARTICLE XIII CONVENTIONS: CONSTITUTIONAL AMENDMENT AND REVISION

Section 1. *Convention of the People.* No Convention of the People of this State shall ever be called unless by the concurrence of two-thirds of all the members of each house of the General Assembly, and unless the proposition "Convention or No Convention" is first submitted to the qualified voters of the State at the time and in the manner prescribed by the General Assembly. If a majority of the votes cast upon the proposition are in favor of a Convention, it shall assemble on the day prescribed by the General Assembly. The General Assembly shall, in the act submitting the convention proposition, propose limitations upon the authority of the Convention; and if a majority of the votes cast upon the proposition are in favor of a Convention, those limitations shall become binding upon the Convention. Delegates to the Convention shall be elected by the qualified voters at the time and in the manner prescribed in the act of submission. The Convention shall consist of a number of delegates equal to the membership of the House of Representatives of the General Assembly that submits the convention proposition and the delegates shall be apportioned as is the House of Representatives. A Convention shall adopt no ordinance not necessary to the purpose for which the Convention has been called.

Editor's Note.—The provisions of the first two sentences of this section are similar to those of Art. XIII, § 1, Const. 1868, as amended by the Convention of 1875, and the case cited in the following

annotation was decided under that section.

See 11 N.C.L. Rev. 242, for discussion as to whether the provisions of this section apply to the calling of a convention to consider a proposed federal amendment.

This question was said to perplex the legislature and served to divide the Supreme Court.

General Assembly may call convention to consider proposed amendment to the

U.S. Constitution either under this section or in the exercise of its plenary powers. See Opinions of the Justices, 204 N.C. 806, 172 S.E. 474 (1933).

Sec. 2. Power to revise or amend Constitution reserved to people. The people of this State reserve the power to amend this Constitution and to adopt a new or revised Constitution. This power may be exercised by either of the methods set out hereinafter in this Article, but in no other way.

Editor's Note.—This section is new with the Constitution of 1970.

Sec. 3. Revision or amendment by Convention of the People. A Convention of the People of this State may be called pursuant to Section 1 of this Article to propose a new or revised Constitution or to propose amendments to this Constitution. Every new or revised Constitution and every constitutional amendment adopted by a Convention shall be submitted to the qualified voters of the State at the time and in the manner prescribed by the Convention. If a majority of the votes cast thereon are in favor of ratification of the new or revised Constitution or the constitutional amendment or amendments, it or they shall become effective January first next after ratification by the qualified voters unless a different effective date is prescribed by the Convention.

Editor's Note.—This section is new with the Constitution of 1970.

Sec. 4. Revision or amendment by legislative initiation. A proposal of a new or revised Constitution or an amendment or amendments to this Constitution may be initiated by the General Assembly, but only if three-fifths of all the members of each house shall adopt an act submitting the proposal to the qualified voters of the State for their ratification or rejection. The proposal shall be submitted at the time and in the manner prescribed by the General Assembly. If a majority of the votes cast thereon are in favor of the proposed new or revised Constitution or constitutional amendment or amendments, it or they shall become effective January first next after ratification by the voters unless a different effective date is prescribed in the act submitting the proposal or proposals to the qualified voters.

Editor's Note.—The provisions of this section are similar to those of Art. XIII, § 2, Const. 1868, as amended by the Convention of 1875, and the cases in the following annotation were decided under that section.

Generally.—While to amend the Constitution of the State it is necessary for the voters to approve the proposed amendment to be submitted to them, it is likewise necessary to the validity of the election that the legislature enact the proposition to amend into a statute by a three-fifths vote

of each branch. *Reade v. City of Durham*, 173 N.C. 668, 91 S.E. 712 (1917). See also *Freeman v. Cook*, 217 N.C. 63, 6 S.E.2d 894 (1940).

Date of Election.—The General Assembly at a special session in July, 1956 could provide for the holding prior to November, 1956 of a statewide election for the ratification or rejection of constitutional amendments. See Advisory Opinion in re General Election, 244 N.C. 748, 93 S.E.2d 853 (1956).

ARTICLE XIV MISCELLANEOUS

Section 1. Seat of government. The permanent seat of government of this State shall be at the City of Raleigh.

Editor's Note.—The provisions of this section are similar to those of Art. XIV, § 6, Const. 1868, as amended in 1962.

Sec. 2. *State boundaries.* The limits and boundaries of the State shall be and remain as they now are.

Editor's Note.—The provisions of this section are similar to those of Art. I, § 34, Const. 1868.

Sec. 3. *General laws defined.* Whenever the General Assembly is directed or authorized by this Constitution to enact general laws, or general laws uniformly applicable in every county, city and town, and other unit of local government, or in every local court district, no special or local act shall be enacted concerning the subject matter directed or authorized to be accomplished by general or uniformly applicable laws, and every amendment or repeal of any law relating to that subject matter shall also be general and uniform in its effect throughout the State. General laws may be enacted for classes defined by population or other criteria. General laws uniformly applicable in every county, city and town, and other unit of local government, or in every local court district, shall be made applicable without classification or exception in every county, city and town, and other unit of local government, or in every local court district, as the case may be. The General Assembly may at any time repeal any special, local, or private act.

Editor's Note.—The provisions of this section are similar to those of Art. IV, § 20, Const. 1868, as that article was rewritten in 1962.

Section Amended Effective July 1, 1973.

—This section was rewritten by amendment proposed by Session Laws 1969, c. 1200, s. 1, and adopted by vote of the people at the general election held Nov. 3, 1970. The amended section, which is effective July 1, 1973, reads as follows:

Sec. 3. *General laws defined.* Whenever the General Assembly is directed or authorized by this Constitution to enact general laws, or general laws uniformly applicable throughout the State, or general laws uniformly applicable in every county, city and town, and other unit of local government, or in every local court district, no special or local act shall be enacted concerning the subject matter directed or authorized to be accomplished by general

or uniformly applicable laws, and every amendment or repeal of any law relating to such subject matter shall also be general and uniform in its effect throughout the State. General laws may be enacted for classes defined by population or other criteria. General laws uniformly applicable throughout the State shall be made applicable without classification or exception in every unit of local government of like kind, such as every county, or every city and town, but need not be made applicable in every unit of local government in the State. General laws uniformly applicable in every county, city and town, and other unit of local government, or in every local court district, shall be made applicable without classification or exception in every unit of local government, or in every local court district, as the case may be. The General Assembly may at any time repeal any special, local, or private act.

Sec. 4. *Continuity of laws; protection of office holders.* The laws of North Carolina not in conflict with this Constitution shall continue in force until lawfully altered. Except as otherwise specifically provided, the adoption of this Constitution shall not have the effect of vacating any office or term of office now filled or held by virtue of any election or appointment made under the prior Constitution of North Carolina and the laws of the State enacted pursuant thereto.

Editor's Note.—This section is new with the Constitution of 1970.

Constitution of the United States

We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America.

ARTICLE I

§ 1. All legislative powers herein granted shall be vested in a congress of the United States, which shall consist of a senate and house of representatives.

§ 2. [1.] The house of representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

[2.] No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of the state in which he shall be chosen.

[3.] Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative; and until such enumeration shall be made, the state of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

The first sentence of this clause (art. I, § 2, cl. 3) is amended by Amendment XIV, § 2 and Amendment XVI.

[4.] When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

[5.] The house of representatives shall chuse their speaker and other officers; and shall have the sole power of impeachment.

§ 3. [1.] The senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, for six years; and each senator shall have one vote.

Art. I, § 3, cl. 1, is superseded by Amendment XVII.

[2.] Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

[3.] No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.

[4.] The vice president of the United States shall be president of the senate, but shall have no vote, unless they be equally divided.

[5.] The senate shall chuse their other officers, and also a president pro tempore, in the absence of the vice president, or when he shall exercise the office of president of the United States.

[6.] The senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the president of the United States is tried, the chief justice shall preside: And no person shall be convicted without the concurrence of two-thirds of the members present.

[7.] Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

§ 4. [1.] The times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the congress may at any time by law make or alter such regulations, except as to the places of chusing senators.

[2.] The congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

Cross Reference.—See Amendment XX,
§ 2.

§ 5. [1.] Each house shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner and under such penalties as each house may provide.

[2.] Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

[3.] Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal.

[4.] Neither house, during the session of congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

§ 6. [1.] The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same and for any speech or debate in either house they shall not be questioned in any other place.

[2.] No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States which shall have been created or the emoluments whereof shall have been increased during such time, and no person holding any office under the United States shall be a member of either house during his continuance in office.

§ 7. [1.] All bills for raising revenue shall originate in the house of representatives; but the senate may propose or concur with amendments as on other bills.

[2.] Every bill which shall have passed the house of representatives and the senate shall, before it become a law, be presented to the president of the United States. If he approve, he shall sign it; but if not, he shall return it with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the president within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the congress by their adjournment prevent its return, in which case it shall not be a law.

[3.] Every order, resolution, or vote to which the concurrence of the senate and house of representatives may be necessary (except on a question of adjournment) shall be presented to the president of the United States; and before the same shall take effect, shall be approved by him, or, being disapproved by him, shall be repassed by two-thirds of the senate and house of representatives, according to the rules and limitations prescribed in the case of a bill.

§ 8. The congress shall have power [1.] To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

[2.] To borrow money on the credit of the United States;

[3.] To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

[4.] To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

[5.] To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

[6.] To provide for the punishment of counterfeiting the securities and current coin of the United States;

[7.] To establish post offices and post roads;

[8.] To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

[9.] To constitute tribunals inferior to the supreme court;

[10.] To define and punish piracies and felonies committed on the high seas, and offences against the law of nations;

[11.] To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

[12.] To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

[13.] To provide and maintain a navy;

[14.] To make rules for the government and regulation of the land and naval forces;

[15.] To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;

[16.] To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers and

the authority of training the militia according to the discipline prescribed by congress;

[17.] To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings;— and

[18.] To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

§ 9. [1.] The migration or importation of such persons as any of the states now existing shall think proper to admit shall not be prohibited by the congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

[2.] The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

[3.] No bill of attainder or ex post facto law shall be passed.

[4.] No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

[5.] No tax or duty shall be laid on articles exported from any state.

[6.] No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another: nor shall vessels bound to, or from, one state, be obliged to enter, clear or pay duties in another.

[7.] No money shall be drawn from the treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

[8.] No title of nobility shall be granted by the United States: And no person holding any office of profit or trust under them shall, without the consent of the congress, accept of any present, emolument, office or title, of any kind whatever, from any king, prince, or foreign state.

§ 10. [1.] No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts, pass any bill of attainder, ex post facto law, or law impairing the obligations of contracts, or grant any title of nobility.

[2.] No state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, and the net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress.

[3.] No state shall, without the consent of congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II

§ 1. [1.] The executive power shall be vested in a president of the United States of America. He shall hold his office during the term of four years, and, together with the vice president, chosen for the same term, be elected, as follows:

[2.] Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the congress: but no senator or

representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

[3.] The electors shall meet in their respective states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate. The president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the president, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the house of representatives shall immediately chuse by ballot one of them for president; and if no person have a majority, then from the five highest on the list the said house shall in like manner chuse the president. But in chusing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the president, the person having the greatest number of votes of the electors shall be the vice president. But if there should remain two or more who have equal votes, the senate shall chuse from them by ballot the vice president.

Art. II, § 1, cl. 3, is superseded by Amendment XII.

[4.] The congress may determine the time of chusing the electors and the day on which they shall give their votes; which day shall be the same throughout the United States.

[5.] No person except a natural born citizen, or a citizen of the United States at the time of the adoption of this constitution, shall be eligible to the office of president; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

[6.] In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice president, and the congress may by law provide for the case of removal, death, resignation, or inability, both of the president and vice president, declaring what officer shall then act as president, and such officer shall act accordingly, until the disability be removed, or a president shall be elected.

[7.] The president shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

[8.] Before he enter on the execution of his office, he shall take the following oath or affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the office of president of the United States, and will to the best of my ability preserve, protect and defend the constitution of the United States."

§ 2. [1.] The president shall be commander in chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

[2.] He shall have power, by and with the advice and consent of the senate to make treaties, provided two-thirds of the senators present concur; and he shall

nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law: but the congress may by law vest the appointment of such inferior officers, as they think proper, in the president alone, in the courts of law, or in the heads of departments.

[3.] The president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions which shall expire at the end of their next session.

§ 3. He shall from time to time give to the congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

§ 4. The president, vice president and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE III

§ 1. The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

§ 2. [1.] The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

See Amendment XI, as to suits against a state by citizens of another state or citizens or subjects of a foreign state.

[2.] In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make.

[3.] The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed.

§ 3. [1.] Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

[2.] The congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

ARTICLE IV

§ 1. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

§ 2. [1.] The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

[2.] A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

[3.] No person held to service or labour in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on claim of the party to whom such service or labour may be due.

§ 3. [1.] New states may be admitted by the congress into this union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned as well as of the congress.

[2.] The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

§ 4. The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.

ARTICLE V

The congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the congress: Provided, that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the senate.

ARTICLE VI

[1.] All debts contracted and engagements entered into, before the adoption of this constitution, shall be as valid against the United States under this constitution as under the confederation.

[2.] This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the

authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

[3.] The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII

The ratification of the conventions of nine states shall be sufficient for the establishment of this constitution between the states so ratifying the same.

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty-seven and of the Independence of the United States of America the Twelfth. In Witness whereof we have hereunto subscribed our names.

Go. WASHINGTON
Presidt. and deputy from Virginia.

New Hampshire.

John Langdon and Nicholas Gilman.

Massachusetts.

Nathaniel Gorham and Rufus King.

Connecticut.

Wm. Saml. Johnson and Roger Sherman.

New York.

Alexander Hamilton.

New Jersey.

Wil: Livingston, David Brearley, Wm. Patterson and Jona: Dayton.

Pennsylvania.

B. Franklin, Robt. Morris, Thos. Fitzsimmons, James Wilson, Thomas Mifflin, Geo. Clymer, Jared Ingersoll and Gouv Morris.

Delaware.

Geo. Read, John Dickenson, Jaco: Broom, Gunning Bedford Jun, and Richard Bassett.

Maryland.

James McHenry, Danl. Carroll and Dan: of St. Thos. Jenifer.

Virginia.

John Blair—James Madison, Jr.

North Carolina.

Wm. Blount, Hu Williamson and Richd. Dobbs Spaight.

South Carolina.

Charles Pinckney, J. Rutledge, Charles Cotesworth Pinckney and Pierce Butler.

Georgia.

William Few and Abr. Baldwin.
Attest: William Jackson, Secretary.

The states ratified the constitution in the following order :

Delaware	December 7, 1787
Pennsylvania	December 12, 1787
New Jersey	December 18, 1787
Georgia	January 2, 1788
Connecticut	January 9, 1788
Massachusetts	February 6, 1788
Maryland	April 26, 1788
South Carolina	May 23, 1788
New Hampshire	June 21, 1788
Virginia	June 26, 1788
New York	July 26, 1788
North Carolina	November 21, 1789
Rhode Island	May 29, 1790

AMENDMENTS

Articles in addition to, and amendment of, the constitution of the United States of America, proposed by congress, and ratified by the legislatures of the several states, pursuant to the fifth article of the original constitution.

The first ten amendments were proposed by Congress on September 25, 1789, and became effective on December 15, 1791.

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

AMENDMENT II.

A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

AMENDMENT III.

No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war but in a manner to be prescribed by law.

AMENDMENT IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

AMENDMENT V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT VI.

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with

the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reëxamined in any court of the United States than according to the rules of the common law.

AMENDMENT VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX.

The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people.

AMENDMENT X.

The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people.

AMENDMENT XI.

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

AMENDMENT XII.

The electors shall meet in their respective states, and vote by ballot for president and vice president, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice president, and they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice president, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate;—the president of the senate shall, in the presence of the senate and house of representatives, open all the certificates and the votes shall then be counted;—the person having the greatest number of votes for president shall be the president, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as president, the house of representatives shall choose immediately, by ballot, the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice president shall act as president, as in the case of the death or other constitutional disability of the president. The person having the greatest number of votes as vice president shall be the vice president, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list the senate shall choose the vice president; a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of president shall be eligible to that of vice president of the United States.

AMENDMENT XIII.

§ 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

§ 2. Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XIV.

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

§ 3. No person shall be a senator or representative in congress, or elector of president and vice president, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may by a vote of two-thirds of each house remove such disability.

§ 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

§ 5. The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

AMENDMENT XV.

§ 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

§ 2. The congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XVI.

The congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.

AMENDMENT XVII.

The senate of the United States shall be composed of two senators from each state, elected by the people thereof, for six years; and each senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures.

When vacancies happen in the representation of any state in the senate, the executive authority of such state shall issue writs of election to fill such vacancies: Provided, that the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any senator chosen before it becomes valid as part of the constitution.

AMENDMENT XVIII.

§ 1. After one year from the ratification of this article, the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof, for beverage purposes, is hereby prohibited.

§ 2. The congress and the several states shall have concurrent power to enforce this article by appropriate legislation.

§ 3. This article shall be inoperative unless it shall have been ratified as an amendment to the constitution by the legislatures of the several states, as provided in the constitution, within seven years from the date of the submission hereof to the states by the congress.

AMENDMENT XIX.

§ 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex.

§ 2. Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XX.

§ 1. The terms of the president and vice president shall end at noon on the 20th day of January, and the terms of senators and representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

§ 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

§ 3. If, at the time fixed for the beginning of the term of the president, the president elect shall have died, the vice president elect shall become president. If a president shall not have been chosen before the time fixed for the beginning of his term, or if the president elect shall have failed to qualify, then the vice president elect shall act as president until a president shall have qualified; and the congress may by law provide for the case wherein neither a president elect nor a vice president elect shall have qualified, declaring who shall then act as president, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a president or vice president shall have qualified.

§ 4. The congress may by law provide for the case of the death of any of the persons from whom the house of representatives may choose a president whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the senate may choose a vice president whenever the right of choice shall have devolved upon them.

§ 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

§ 6. This article shall be inoperative unless it shall have been ratified as an amendment to the constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

The Twentieth Amendment was declared dated February 6, 1933, to have been ratified in a proclamation of the Secretary of State, by thirty-nine of the forty-eight states.

AMENDMENT XXI.

§ 1. The eighteenth article of amendment to the constitution of the United States is hereby repealed.

§ 2. The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

§ 3. This article shall be inoperative unless it shall have been ratified as an amendment to the constitution by conventions in the several states, as provided in the constitution, within seven years from the date of the submission hereof to the states by the congress.

The Twenty-first Amendment was declared in a proclamation of the Acting Secretary of State, dated December 5, 1933, to have been ratified by thirty-six of the forty-eight states. By his proclamation of December 5, 1933, the President proclaimed that the Eighteenth Amendment to the Constitution was repealed on December 5, 1933.

AMENDMENT XXII.

§ 1. No person shall be elected to the office of the president more than twice, and no person who has held the office of president, or acted as president, for more than two years of a term to which some other person was elected president shall be elected to the office of the president more than once. But this article shall not apply to any person holding the office of president when this article was proposed by the Congress, and shall not prevent any person who may be holding the office of president, or acting as president, during the term within which this article becomes operative from holding the office of president or acting as president during the remainder of such term.

§ 2. This article shall be inoperative unless it shall have been ratified as an amendment to the constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the congress.

The Twenty-second Amendment was certified by the Administrator of General Services on March 1, 1951, to have been ratified by three fourths of the whole number of states and to have become valid as a part of the Constitution of the United States.

AMENDMENT XXIII.

§ 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

§ 2. The Congress shall have power to enforce this article by appropriate legislation.

The Twenty-third Amendment was certified by the Administrator of General Services on April 3, 1961, to have been ratified by three fourths of the whole number of states and to have become valid as a part of the Constitution of the United States.

AMENDMENT XXIV.

§ 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

§ 2. The Congress shall have power to enforce this article by appropriate legislation.

The Twenty-fourth Amendment was certified by the Administrator of General Services on February 4, 1964, to have been ratified by three fourths of the whole

number of states and to have become valid as a part of the Constitution of the United States.

AMENDMENT XXV.

§ 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

§ 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

§ 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

§ 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

The Twenty-fifth Amendment was certified by the Administrator of General Services on February 23, 1967, to have been ratified by three fourths of the whole num-

ber of states and to have become valid as a part of the Constitution of the United States.

Appendix I. Rules of Practice in the General Court of Justice

(1) RULES OF PRACTICE IN THE SUPREME COURT OF NORTH CAROLINA

(Rules revised and approved at the spring term, 1961, of the Supreme Court of North Carolina, as amended down through January 31, 1969.)

- | Rule | Rule |
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Supplementary Rules

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Rule

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Supp.
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1. Terms of Court

There shall be two terms of Court each year—a Spring Term commencing on the first Tuesday in February and a Fall Term commencing on the first Tuesday in September.

Editor's Note.—This rule was adopted Jan. 31, 1969. The Supreme Court order also deleted obsolete Rules 1, 2, 3(a), 3(b) and 3(c). The obsolete rules related to licensing by the Supreme Court of applicants to practice law. Admission by examination is now regulated by § 84-24. And see "Rules Governing Admission to Practice of Law," IX of this Appendix.

The rules of the Supreme Court are **mandatory, not directory**. *Cooper v. Board of Comm'rs*, 184 N.C. 615, 113 S.E. 569 (1922); *Washington County v. Norfolk S. Land Co.*, 222 N.C. 637, 24 S.E.2d 338 (1943).

The rules of the Supreme Court are mandatory and will be enforced. *State v. Baldwin*, 276 N.C. 690, 174 S.E.2d 526 (1970).

The rules of the Supreme Court have been dictated by experience and stem from a desire to expedite business. They are mandatory and will be enforced. *State v. Blackwell*, 276 N.C. 714, 174 S.E.2d 534 (1970).

The impression seems to prevail to some extent that the rules of practice prescribed by the Supreme Court are merely directory—that they may be ignored, disregarded, and suspended almost as of course. This is a serious mistake. The Supreme Court has

ample authority to make them. They are deemed essential to the protection of the rights of litigants and the due administration of justice. They have force, and the Supreme Court will certainly see that they have effect and are duly observed whenever they properly apply. *Cooper v. Board of Comm'rs*, 184 N.C. 615, 113 S.E. 569 (1922).

Exclusive Power to Make Rules.—The Supreme Court is given, by N.C. Const., Art. I, § 6, exclusive power to make its own rules of practice, without legislative authority to interfere, and in case of conflict the rules made by the Supreme Court will be observed. *Cooper v. Board of Comm'rs*, 184 N.C. 615, 113 S.E. 569 (1922).

The General Assembly can enact no rules of practice and procedure for the Supreme Court. *Cooper v. Board of Comm'rs*, 184 N.C. 615, 113 S.E. 569 (1922).

Dismissal of Appeal for Noncompliance with Rules.—Ordinarily motions to dismiss appeals will be allowed, upon a failure to comply with the rules of the Supreme Court, without discussing the merits of the case. *Davis v. Wall*, 142 N.C. 450, 55 S.E. 350 (1906).

2-3 (c). Obsolete.

Cross Reference.—See Editor's note to Rule 1.

4. Appeals—How Docketed

Each appeal shall be docketed from the judicial district to which it properly belongs, and appeals in criminal cases from each district shall be placed at the head of the docket for the district. Appeals in both civil and criminal cases shall be docketed each in its own class, in the order in which they are filed with the clerk.

The rules of the Supreme Court governing appeals are mandatory and not directory, and must be universally enforced. *Warshaw v. Warshaw*, 236 N.C. 754, 73 S.E.2d 900 (1952); *Balint v. Grayson*, 256 N.C. 490, 124 S.E.2d 364 (1962).

The rules of practice in the Supreme Court are mandatory and will be enforced. *Williams v. Boulterice*, 269 N.C. 499, 153 S.E.2d 95 (1967).

An order overruling a demurrer for failure to state a cause of action is subject to immediate review only by writ of certiorari. *Charles H. Jenkins & Co. v. Lewis*, 259 N.C. 85, 130 S.E.2d 49 (1963).

Cited in *Galloway v. Lawrence*, 263 N.C. 433, 139 S.E.2d 761 (1965).

4(a). Appeals—Order Overruling Demurrer or Striking or Refusing to Strike Allegations in Pleadings

From and after the first day of the Spring Term of 1956, this Court will not entertain an appeal:

(1) From an order overruling a demurrer except when the demurrer is interposed as a matter of right for misjoinder of parties and causes of action. The movant may enter an exception to the order overruling the demurrer and present the question thus raised to this Court on the final appeal; provided that when the demurrant conceives that the order overruling his demurrer will prejudicially affect a substantial right to which he is entitled unless the ruling of the court is reviewed on appeal prior to the trial of the cause on its merits, he may petition this Court for a writ of certiorari within thirty days from the date of the entry of the order overruling the demurrer.

(2) From an order striking or denying a motion to strike allegations contained in pleadings. When a party conceives that such order will be prejudicial to him on the final hearing of said cause, he may petition this Court for a writ of certiorari within thirty days from the date of the entry of the order.

Review of Order Overruling Demurrer for Failure to State Cause of Action. — Prior to trial on the merits, an order overruling a demurrer for failure to state a cause of action can be reviewed only by writ of certiorari. *Boles v. Graham*, 249 N.C. 131, 105 S.E.2d 296 (1958).

Review of Order Striking Allegations. —An order striking allegations contained in a pleading is not appealable and may be reviewed prior to trial only by certiorari. *Williams v. Denning*, 260 N.C. 539, 133 S.E.2d 150 (1963).

An order striking allegations from the complaint is not immediately reviewable except by certiorari. *Williams v. Denning*, 260 N.C. 540, 133 S.E.2d 148 (1963).

The allowance of a motion to strike portions of the complaint is not immediately appealable but may be reviewed only by certiorari. Such motion does not admit the truth of the allegation sought to be stricken for the purpose of a hearing on the motion to strike or otherwise. The allowance of a

motion to strike is appealable only when it is to strike a cause of action, a plea in bar, or a defense in its entirety, amounting to a demurrer or the granting of a plea in bar. *Cecil v. High Point, T. & D.R.R.*, 266 N.C. 728, 147 S.E.2d 223 (1966).

Order denying defendant's motion to strike designated allegations in the complaint is not appealable. *Prewitt v. Dover*, 269 N.C. 687, 153 S.E.2d 382 (1967).

Order denying plaintiff's motion to strike designated portions of the answer is not appealable. *Prewitt v. Dover*, 269 N.C. 687, 153 S.E.2d 382 (1967).

Plaintiff was not entitled to an immediate appeal as a matter of right from an order striking only one of several alleged specifications of negligence from the complaint but was entitled to immediate review only upon allowance of a petition for writ of certiorari. *Sharpe v. Pugh*, 270 N.C. 598, 155 S.E.2d 108 (1967).

Rule Does Not Apply to Overruling of Demurrer for Misjoinder. — When a de-

murrer is overruled on the ground of a misjoinder of parties and causes this rule does not apply. *Hall v. DeWeld Mica Corp.*, 244 N.C. 182, 93 S.E.2d 56 (1956).

Order overruling demurrer for misjoinder of parties alone is not immediately appealable but may be reviewed only by certiorari. *Miller v. Jones*, 268 N.C. 568, 151 S.E.2d 23 (1966).

The mere fact that the demurrer is entitled, "Demurrer for Misjoinder of Parties and Causes," and contains an assertion that there is a misjoinder of parties and causes of action, when, in fact, the assertion is without substance, is insufficient basis for an appeal as a matter of right from an order overruling such demurrer. *Prewitt v. Dover*, 269 N.C. 687, 153 S.E.2d 382 (1967).

Nor Does It Apply to Order Sustaining Demurrer.—An order or judgment which sustains a demurrer to a plea in bar affects a substantial right and a defendant may appeal therefrom. This rule, when otherwise applicable, limits the right of immediate appeal only in instances where a demurrer is overruled. *Mercer v. Hilliard*, 249 N.C. 725, 107 S.E.2d 554 (1959); *Hardin v. American Mut. Fire Ins. Co.*, 261 N.C. 67, 134 S.E.2d 142 (1964); *Quick v. High Point Mem. Hosp., Inc.*, 269 N.C. 450, 152 S.E.2d 527 (1967).

This rule has no application when the order striking a portion of the pleading is in effect a demurrer denying the pleader a right to recover for failure to state facts sufficient to constitute a cause of action. Such an order comes within the provisions of § 1-277, and the party adversely affected may appeal. *Etheridge v. Carolina Power & Light Co.*, 249 N.C. 367, 106 S.E.2d 560 (1959).

In allowing plaintiffs' motion to strike paragraphs of the answer, the court in effect sustained a demurrer to each of defendant's further defenses, hence, this rule does not apply. *Jewell v. Price*, 259 N.C. 345, 130 S.E.2d 668 (1963).

A motion to strike allegations in the complaint was equivalent to a demurrer to the purported cause of action, and the effect of an order allowing the motion was to sustain the demurrer. This rule has no application to such orders, for they come within the provisions of § 1-277. *Davis v. North Carolina State Highway Comm'n*, 271 N.C. 405, 156 S.E.2d 685 (1967).

In a proceeding by a housing authority to condemn land, a motion of the housing authority to strike in their entirety allegations in the answer setting up a plea in bar that the housing authority acted capriciously or arbitrarily in selecting the

land for the site of the housing project, was in effect a demurrer to the plea in bar, an order allowing the motion is appealable, and this rule was not applicable. *Housing Authority v. Wooten*, 257 N.C. 358, 126 S.E.2d 101 (1962).

Prejudice to Pleader.—The defendant is authorized to file a petition for a writ of certiorari pursuant to the provisions of the rule, if the order overruling its demurrer, in its opinion, will prejudicially affect a substantial right to which it is entitled unless the ruling of the Court is reviewed on appeal prior to the trial of the cause on its merits. *City of Winston-Salem v. Winston-Salem City Coach Lines, Inc.*, 245 N.C. 179, 95 S.E.2d 510 (1956).

When Rules for Appeal Are Applicable to Certiorari.—It should be clearly understood that the rules applicable to an appeal apply to a review upon certiorari where such review permitted under this section, is in effect an appeal. *Eastern Steel Prods. Corp. v. Chestnutt*, 252 N.C. 269, 113 S.E.2d 587 (1960).

What Certiorari Brings Up for Review.—Certiorari granted under this rule brings to the Supreme Court for immediate review only the petitioner's exceptions to rulings made by the Court below. *Harrell v. Powell*, 249 N.C. 244, 106 S.E.2d 160 (1958).

Effect of Noncompliance with Rule 19 (3).—The record as filed pursuant to the terms of the writ of certiorari allowed will be treated as an exception to the order or orders which petitioner seeks to have reviewed, and even though the exceptions relied on are not grouped and separately numbered as required by Rule 19 (3), the appeal will not be dismissed, but nothing is presented for decision on such record except the question whether the pleadings and admitted facts on which the trial court ruled support the orders entered, and whether any error of law appears on the face of the record. *Clark v. Pilot Freight Carriers, Inc.*, 247 N.C. 705, 102 S.E.2d 252 (1958).

Time for Answering or Petitioning for Certiorari.—A defendant has thirty days after order overruling his demurrer in which to file answer or petition the Supreme Court for certiorari. *Wheeler v. Thabit*, 261 N.C. 479, 135 S.E.2d 10 (1964).

Applied in *C.R. Wilks, Inc. v. Dillingham*, 244 N.C. 522, 94 S.E.2d 495 (1956); *Clements v. Simmons*, 244 N.C. 523, 94 S.E.2d 480 (1956); *Willcox v. Di Capadarso*, 244 N.C. 741, 94 S.E.2d 925 (1956); *Lowry v. Dillingham*, 246 N.C. 618, 99 S.E.2d 771 (1957); *Nixon v. Liberty Mut. Ins. Co.*, 255 N.C. 106, 120 S.E.2d 430

(1961); *Durham Bank & Trust Co. v. Pollard*, 256 N.C. 77, 123 S.E.2d 104 (1961); *Spivey v. Boyce*, 257 N.C. 630, 127 S.E.2d 228 (1962); *Outboard Marine Corp. v. Futrell*, 267 N.C. 194, 147 S.E.2d 893 (1966).

Cited in *Ragland v. Kellogg*, 249 N.C. 646, 107 S.E.2d 69 (1959); *Dawson Constr.*

Co. v. Hyde County Bd. of Educ., 254 N.C. 311, 118 S.E.2d 753 (1961); *Greer v. Skyway Broadcasting Co.*, 256 N.C. 382, 124 S.E.2d 98 (1962); *Williams v. Hunter*, 257 N.C. 754, 127 S.E.2d 546 (1962); *Godfrey v. Smith*, 266 N.C. 402, 146 S.E.2d 431 (1966); *King v. Insurance Co. of N. America*, 273 N.C. 396, 159 S.E.2d 891 (1968).

5. Direct Appeal from Judgment of Superior Court—When Docketed

A direct appeal of right from a judgment of a superior court which includes a sentence of death or imprisonment for life as provided in G.S. 7A-27 (a) shall be docketed in the Supreme Court within one hundred twenty (120) days from the date on which judgment was pronounced in the superior court. The appeal will be calendared by the Supreme Court for hearing at any time it may deem appropriate after the expiration of twenty-eight (28) days from the date on which the cause was docketed in the Supreme Court. The appellant's brief must be filed within ten (10) days after the appeal is docketed; and the appellee's brief must be filed within twenty (20) days after the appeal is docketed.

Cross References.—As to dismissal of appeals when not docketed within time required by this rule, see Rule 17 and note thereto. As to certiorari, see Rule 34 and note thereto. As to appeals generally, see § 1-268 et seq. As to requisites of the transcript, see § 1-284 and note thereto.

Editor's Note.—The cases cited in the note below were decided under former provisions of this rule.

Rules Mandatory.—The rule of the Supreme Court requiring the docketing of the appeal within a certain time is mandatory. *State v. Farmer*, 188 N.C. 243, 124 S.E. 562 (1924); *State ex rel. Mills v. National Sur. Co.*, 192 N.C. 52, 133 S.E. 172 (1926); *Pruitt v. Wood*, 199 N.C. 788, 156 S.E. 126 (1930).

The rules of the Supreme Court regulating appeals are mandatory. *Womble v. Moncure Mill & Gin Co.*, 194 N.C. 577, 140 S.E. 230 (1927); *Pentuff v. Park*, 195 N.C. 609, 143 S.E. 139 (1928). And must be equally observed, or the case will be dismissed. *Covington v. Hanes Hosiery Mills Co.*, 195 N.C. 478, 142 S.E. 705 (1928).

Where the record from the general county court is not docketed in the superior court within the time prescribed, the appeal is properly dismissed, it being provided by § 7-295 that appeals from the general county court shall be governed by the rules governing appeals from the superior courts to the Supreme Court, and dismissal in such circumstances is mandatory under this rule. *Grogg v. Graybeal*, 209 N.C. 575, 184 S.E. 85 (1936).

The rules may not be disregarded by the legislature, the judge of a superior court,

or by litigants or counsel. The Supreme Court has found it necessary to enforce them uniformly. *Pentuff v. Park*, 195 N.C. 609, 143 S.E. 139 (1928); *State v. Walker*, 245 N.C. 658, 97 S.E.2d 219 (1957).

This rule regulating the time within which appeals must be docketed in the Supreme Court is mandatory and cannot be abrogated by consent or otherwise. *Jones v. Jones*, 232 N.C. 518, 61 S.E.2d 335 (1950).

When case is not docketed within time prescribed by this rule and no application for writ of certiorari is made, appeal will be dismissed, the rules of practice in the Supreme Court being mandatory and not directory. *State v. Presnell*, 226 N.C. 160, 36 S.E.2d 927 (1946).

And Dismissal Results Where Agreement of Parties Prohibits Compliance Therewith.—Where the parties agree upon an extension of time for service of case on appeal that will not permit the docketing of the appeal in the Supreme Court in time to be heard according to the procedure in such instances, they knowingly put it beyond their power to comply with the mandatory provisions of this rule of the procedure, and the case will be dismissed in the Supreme Court when these requirements have not been complied with by the appellant. *Pruitt v. Wood*, 199 N.C. 788, 156 S.E. 126 (1930).

This rule and Rule 7 may not be varied, either in criminal or civil cases, under agreement with the solicitor or opposing counsel to extend time to the appellant later than that allowed; and when these requirements for any reason cannot be complied with, the appellant must docket the

record proper in the Supreme Court, and apply to the Court for a certiorari. *State v. Trull*, 169 N.C. 363, 85 S.E. 133 (1915).

Legislature Cannot Change Rule.—The power of the legislature to permit an extension of the time for settling the case on appeal does not permit it to impinge upon the rule of the Supreme Court requiring the docketing thereof within a prescribed time. *State v. Butner*, 185 N.C. 731, 117 S.E. 163 (1923).

Nor Can Rule Be Changed by Parties or Trial Judge.—The rules of the Supreme Court regulating the time of docketing appeals are uniformly enforced by the Court, without authority to the judges or parties to the action to change them by agreement or otherwise. *Rose v. Rocky Mount*, 184 N.C. 609, 113 S.E. 506 (1922); *Finch v. Commissioners of Nash County*, 190 N.C. 154, 129 S.E. 195 (1925); *Stone v. Ledbetter*, 191 N.C. 777, 133 S.E. 162 (1926).

Failure to Docket.—The motion for a certiorari in the Supreme Court by appellant who has failed to docket his case in time under the requirements of this section may be allowed, in the discretion of the Court, upon the docketing of the record proper and the showing as required for merit and want of laches. *State v. Taylor*, 194 N.C. 738, 140 S.E. 728 (1927).

Failure to Docket Entire Record.—Though the Court, without appellant's fault, fails to settle the case, appellant must within the time allowed by this section docket all of the record proper, or so much thereof as he can obtain, and file an affidavit as to why the entire record cannot be docketed; otherwise the appeal will be dismissed. *Caudle v. Morris*, 158 N.C. 594, 74 S.E. 98 (1912).

Case Is Subject to Dismissal on Motion or by Court ex Mero Motu.—The defendant not having docketed his case on appeal within the time prescribed by this rule, nor having docketed the record proper and moved for a writ of certiorari before the expiration of time allowed docketing criminal appeals, the case is subject to dismissal either upon motion of the Attorney General or ex mero motu by the Court. *State v. Walker*, 245 N.C. 658, 97 S.E.2d 219 (1957).

Extension of Time Granted for Settling Case on Appeal.—When by consent of the appellant, or by order of the judge, such a long extension of time is granted for settling a case on appeal as to put it beyond the power of appellant to have the case ready for hearing, as required by the rules, the appellant runs the risk of losing his right of appeal. In such instances, unless the appellant gets his appeal docketed

in time, as required by the rules of the Court, notwithstanding the time allowed, or dockets the record proper and moves for a writ of certiorari, the right of appeal will be lost. *State v. Walker*, 245 N.C. 658, 97 S.E.2d 219 (1957).

Motion for Certiorari Where Case Is Not Ready for Hearing.—Where, from lack of sufficient time or other cogent reason, the case is not ready for hearing, it is permissible for the appellant, within the time prescribed, to docket the record proper and move for a certiorari, which motion may be allowed by the Court in its discretion, on sufficient showing made, but such writ is not one to which the moving party is entitled as a matter of right. The issuance of a writ of certiorari, however, does not change the time already fixed by agreement of the parties, or by order of Court, for serving statement of case on appeal, and exceptions or counter case. *State v. Walker*, 245 N.C. 658, 97 S.E.2d 219 (1957); *Pruitt v. Wood*, 199 N.C. 788, 156 S.E. 126 (1930).

Neglect of Attorney.—The negligence of counsel sending up, docketing, and printing the transcript is that of the client. *Truelove v. Norris*, 152 N.C. 755, 67 S.E. 487 (1910); *Howard v. Speight*, 180 N.C. 653, 104 S.E. 35 (1920). See also *Carroll v. Victory Mfg. Co.*, 180 N.C. 660, 104 S.E. 528 (1920); *Kear v. Drake*, 182 N.C. 764, 108 S.E. 393 (1921).

Agreements of Counsel.—The requirement of this rule will be enforced uniformly regardless of an agreement to the contrary that the attorneys for the parties may have made in any particular case. *State v. Farmer*, 188 N.C. 243, 124 S.E. 562 (1924).

Negotiations for Compromise of Action.—The fact that, on an appeal, negotiations for compromise were pending, is no excuse for failure to docket the appeal. *British & Am. Mortgage Co. v. Long*, 116 N.C. 77, 20 S.E. 964 (1895).

Filing of Original Papers by Appellant.—Where the appellant fails to file a transcript of the record, but attempts to file the original papers from the trial court, his motion for reinstatement after dismissal of appeal will be denied for laches. *Lindsey v. Supreme Lodge of Knights of Honor*, 172 N.C. 818, 90 S.E. 1013 (1916).

Transcript Mailed in Time.—Where the transcript of a record is deposited in the post office in ample time to reach the Supreme Court within the time required by this section, but by some delay in the mails does not reach its destination until after the time has expired, the excuse is reasonable, and the appeal will not be dis-

missed. *Walker v. Scott*, 104 N.C. 481, 10 S.E. 523 (1889).

Fees Must Be Paid before Transcript Docketed.—The clerk of the Supreme Court is not required to docket a transcript of an appeal before appellant has paid him the required fee therefor. *Dunn v. Clerk's Office*, 176 N.C. 50, 96 S.E. 738 (1918). But see *West v. Reynolds*, 94 N.C. 333 (1886). See § 6-34 and note thereto.

Failure to Pay Costs.—Where a transcript is not sent up in time by reason of the appellant's failure, when notified, to pay costs of the transcript, as he is bound to do, the appellee may move to docket and dismiss the appeal. *Bailey v. Brown*, 105 N.C. 127, 10 S.E. 1054 (1890).

Delay of Clerk.—Failure to docket the transcript on appeal within the time required by this rule cannot be excused by delay of the clerk, in which case appellant should docket the title of the case with affidavit as to the cause of delay. *Carroll v. Victory Mfg. Co.*, 180 N.C. 660, 104 S.E. 528 (1920).

It is no sufficient excuse for the appellant's failure to docket his appeal under this rule that the case was delayed in being settled and that the clerk was too busy with a term of court to make out the transcript. *Hewitt v. Beck*, 152 N.C. 757, 67 S.E. 586 (1910).

The mere fact that appellant tendered payment to the superior court clerk of

his fees for transcript on appeal, and the clerk said he would send up the transcript without payment is no sufficient legal excuse for the failure to docket under this rule. *Truelove v. Norris*, 152 N.C. 755, 67 S.E. 487 (1910).

Case Not Settled.—It is no excuse for failure to docket the appeal that the case on appeal was not settled by the judge until too late to docket the case at the proper term, it being appellant's duty to docket the record proper and ask for a writ of certiorari to perfect the transcript. *Pittman v. Kimberly*, 92 N.C. 562 (1885); *State v. Telfair*, 139 N.C. 555, 51 S.E. 911 (1905); *Kerr v. Drake*, 182 N.C. 764, 108 S.E. 393 (1921).

Renewing of Withdrawn Appeal.—A party to an action has a right to renew his appeal after having once withdrawn it, provided he does so within the time prescribed by the statutes and rules for perfecting appeals. *State v. Chastain*, 104 N.C. 900, 10 S.E. 519 (1889).

Case Is Dismissed if Moot Question Presented.—Where on appeal it appears that an election sought to be enjoined has already been held, the appeal presents only a moot question, and will be dismissed. *Rousseau v. Bullis*, 201 N.C. 12, 158 S.E. 553 (1931).

Cited in *State v. Potts*, 266 N.C. 117, 145 S.E.2d 307 (1965).

6. Appeals in Criminal Cases—Priority

Appeals in criminal cases shall have priority over civil cases and will be calendared accordingly by the Supreme Court for hearing, unless for cause otherwise ordered.

Cross References.—As to appeals in criminal actions generally, see § 15-177 et seq. and note thereto. As to the appeal bond, see § 1-285 et seq. As to costs on appeal generally, see § 6-33 et seq.

Case Dismissed if Appeal Abandoned.—When the defendant in a criminal action appeals to the Supreme Court, but, pend-

ing appeal, breaks jail and flees the jurisdiction of the Court, this is an abandonment of the appeal; and, upon motion of the Attorney General, the appeal will be dismissed, or case continued, or judgment affirmed, in the discretion of the Court. *State v. Keebler*, 145 N.C. 560, 59 S.E. 872 (1907).

7. Hearings

During the Spring Term of the Supreme Court hearings will be held on the second Tuesday of the months of February, March, April and May; and during the Fall Term, hearings will be held on the second Tuesday of the months of September, October, November and December. Hearings will begin on these dates and will continue from day to day until appeals in all calendared cases have been heard.

Cross Reference.—See Rule 9.

8. End of Docket

At the Spring Term, causes not reached and disposed of during the period allotted to each district, and those for any other cause put to the foot of the docket,

shall be called at the close of argument of appeals from the Fifteenth and Sixteenth Districts, and each cause, in its order, tried or continued, subject to Rule 6.

At the Fall Term, appeals in criminal cases only will be heard at the end of the docket, unless the Court for special reason shall set a civil appeal to be heard at the end of the docket at that term. At either term the Court in its discretion may place cases not reached on the call of a district at the end of some other district.

9. Call of Docket

Each appeal shall be called in its proper order. If any party shall not be ready, the cause, if a civil action, may be put to the foot of the district, by the consent of the counsel appearing, or for cause shown, and be again called when reached, if the docket shall be called a second time; otherwise, the first call shall be peremptory; or at the first term of the Court in the year a cause may, by consent of the Court, be put to the foot of the docket; if no counsel appear for either party at the first call, it will be put to the end of the district, unless a printed brief is filed by one of the parties; and if none appear at the second call, it will be continued, unless the Court shall otherwise direct. Appeals in criminal actions will be called peremptorily for argument on the first call of the docket, unless for good cause assigned.

Counsel Must Attend All Week.—The Supreme Court has no daily calendar, and counsel must attend during the week for

which the case is set under the rules. *Lunsford v. Alexander*, 162 N.C. 528, 78 S.E. 275 (1913).

10. Submission on Printed Arguments

By consent of counsel, any case may be submitted without oral argument, upon printed briefs by both sides, without regard to the number of the case on the docket, or date of docketing the appeal. Such consent must be signed by counsel of both parties and filed, and the clerk shall make a note thereof on the docket; but the Court, notwithstanding, may direct an oral argument to be made, if it shall deem best.

An appeal submitted under this rule must be docketed before the call of appeals from the Fourteenth and Seventeenth Districts has been entered upon, unless it appears to the Court from the record that there has been no delay in docketing the appeal, and that it has been docketed as soon as practicable, and that public interest requires a speedy hearing of the case.

(Note—A compliance with this rule does not require a formal motion, but merely the filing with the printed record and briefs an agreement signed by counsel for both sides, that the case may be considered without oral argument.)

Necessity of Brief. — A case cannot be submitted in Supreme Court without oral argument unless a printed argument or brief for each party is filed. *Mills v. Guaranty Co.*, 136 N.C. 255, 48 S.E. 652 (1904).

Applied in *Shaw University v. Durham*

Life Ins. Co., 230 N.C. 526, 53 S.E.2d 656 (1949); *Keeter v. Town of Lake Lure*, 264 N.C. 252, 141 S.E.2d 634 (1965).

Cited in *Fuquay v. Fuquay*, 232 N.C. 692, 62 S.E.2d 320 (1950).

11. Briefs Not Received After Argument

When the case is argued orally on the regular call of the docket, in behalf of only one of the parties, no printed argument for the other party will be received, unless it is filed before the oral argument begins. No brief or argument will be received after a case has been argued or submitted, except upon leave granted in open court, after notice to opposing counsel.

12. Briefs Regarded as Personal Appearance

When a case is reached on the regular call of the docket, and a printed brief

or argument shall be filed for either party, the case shall stand on the same footing as if there were a personal appearance by counsel.

Opposition to Continuance.—The party filing a printed brief is to be taken as asking a decision at such term, and as opposing a continuance, and a motion by the opposite party to continue the case till

next term will not be granted unless expressly assented to or for good cause shown. *Dibrell v. Georgia Home Ins. Co.*, 109 N.C. 314, 13 S.E. 739 (1891).

13. When Case May Be Heard Out of Order

In cases where the State is concerned, involving or affecting some matter of general public interest, the Court may, upon motion of the Attorney General, assign an earlier place on the calendar, or fix a day for the argument thereof, which shall take precedence of other business. And the Court, at the instance of a party to a cause that directly involves the right to a public office, or at the instance of a party arrested in civil action who is in jail by reason of inability to give bond or from refusal of the court to discharge him, or in other cases of sufficient importance, in its judgment, may make the like assignment in respect to it.

Title to Public Office.—Where an action involving title to public office is begun after the term of the Supreme Court, and on appeal has come to such term of the Supreme Court after the call of the district to which the cause belongs, the Court can, under this rule, set the same down for argument, though it was not entitled to be heard as of right. *Caldwell v. Wilson*, 121 N.C. 423, 28 S.E. 363 (1897).

Enjoining Issue of County Bonds.—An injunction suit to restrain a county from

issuing bonds for the payment of certain county indebtedness will not be advanced for hearing because a certain portion of such indebtedness is due to the board of education for borrowed money. *Black v. Commissioners of Buncombe County*, 129 N.C. 121, 39 S.E. 818 (1901).

Applied in *State v. Childs*, 265 N.C. 575, 144 S.E.2d 653 (1965); *Dilday v. Beaufort County Bd. of Educ.*, 267 N.C. 438, 148 S.E.2d 513, 149 S.E.2d 345 (1966).

14. When Cases May Be Heard Together

Two or more cases involving the same question may, by order of the Court, be heard together, but they must be argued as one case, the Court directing, when the counsel disagree, the course of argument.

15. Appeal Dismissed if Not Prosecuted

Cases not prosecuted for two terms shall, when reached in order at the third term, be dismissed at the cost of appellant, unless the same, for sufficient cause, shall be continued. When so dismissed, the appellant may, at any time thereafter not later than during the week allotted to the district to which it belongs at the next succeeding term, move to have the same reinstated, on notice to the appellee and showing sufficient cause.

Cross References.—As to when appeals will be dismissed, see note to § 1-284, analysis line IV, B. As to judgment on appeal generally, see § 1-297 and note thereto.

Dismissal of Appeal.—Failure to prosecute an appeal for two terms, is sufficient ground for dismissal, unless, for sufficient cause shown, the case shall be continued. The motion to reinstate, upon notice, may be heard not later than the next term. *Brantley v. Jordan*, 92 N.C. 291 (1885); *Wiseman v. Commissioners of Mitchell County*, 104 N.C. 330, 10 S.E. 481 (1889). See also *Briggs v. Jernis*, 98 N.C. 454, 4 S.E. 631 (1887).

Sickness of Attorney.—Where an appeal after being on the docket for two terms was dismissed, when reached in its order at the third term, for want of prosecution, it will not be reinstated on appellant's affidavit that his attorney was sick, it not appearing that the appellant made any inquiry of his attorney regarding the appeal or sought to get other counsel to prosecute it. *Martin v. Chambers*, 116 N.C. 673, 21 S.E. 402 (1895).

When Cause Remanded.—An appeal from the conviction in a criminal case will be docketed and dismissed on motion of the Attorney General when not prosecuted as required by the rules of court, but the

record will be examined for errors appearing upon its face, and where it so appears that the defendant was convicted without a trial by jury after he had entered a plea

of "not guilty," the cause will be remanded to the superior court for trial according to law. *State v. Straughn*, 197 N.C. 691, 150 S.E. 330 (1929).

16. Motion to Dismiss Appeal—When Made

A motion to dismiss an appeal for noncompliance with the requirements of the statute in perfecting an appeal must be made at or before entering upon the trial of the appeal upon its merits, and such motion will be allowed unless such compliance be shown in the record, or a waiver thereof appear therein, or such compliance is dispensed with by a writing signed by the appellee or his counsel, to that effect, or unless the Court shall allow appropriate amendments.

Case Subject to Plea of "Nul Tiel Record".—Although the statement of case on appeal is subject to the plea of "nul tiel record," the Supreme Court will examine it, and upon the absence of reversible error appearing therein or on the face of the

record proper, the judgment will be affirmed and the appeal dismissed. *State v. Goldston*, 201 N.C. 89, 158 S.E. 926 (1931).

Applied in *Oliver v. Williams*, 266 N.C. 601, 146 S.E.2d 648 (1966).

17. Appeal Dismissed for Failure to Docket in Time

If the appellant in a civil action, or the defendant in a criminal prosecution, shall fail to bring up and file a transcript of the record twenty-eight days before the Court begins the call of cases from the district from which it comes at the term of this Court at which such transcript is required to be filed the appellee may file with the clerk of the Court the certificate of the clerk of the court from which the appeal comes, showing the names of the parties thereto, the time when the judgment and appeal were taken, the name of the appellant, and the date of the settling of the case on appeal, if any has been settled, with his motion to docket and dismiss at appellant's cost said appeal, which motion shall be allowed at the first session of the Court thereafter, with leave to the appellant, during the term, and after notice to the appellee, to apply for the redocketing of the cause; Provided, that such motion of appellee to docket and dismiss the appeal will not be considered unless the appellee, before making the motion to dismiss, has paid the clerk of this Court the fee charged by the statute for docketing an appeal, the fee for drawing and entering judgment, and the determination fee, execution for such amount to issue in favor of appellee against appellant.

Cross References.—As to the time within which the record must be docketed, see Rule 5. As to certiorari as a substitute for appeal, see Rule 34 and note thereto.

Editor's Note.—A note to this rule as published in 253 N.C. 816-817 is as follows: Motion made under this rule is not effectual if filed after appeal has been docketed, although appeal was docketed after time required by Rule 5.

Failure to Docket.—When the appellant does not docket his appeal before the perusal of the docket of the district to which it belongs, the appellee, upon filing the certificate required by this rule, is entitled, upon motion, to have the appeal docketed and dismissed. *Rose v. Shaw*, 105 N.C. 126, 10 S.E. 1055 (1890).

It is not discretionary with the Supreme Court to refuse to dismiss an appeal where appellant has failed to docket the case

within the time required by Rule 5, but such refusal can only be based on sufficient legal excuse for the delay. *Hewitt v. Beck*, 152 N.C. 757, 67 S.E. 586 (1910); *Carroll v. Victory Mfg. Co.*, 180 N.C. 660, 104 S.E. 528 (1920).

An appeal from the conviction of a capital felony will be docketed and dismissed on motion of the Attorney General when not prosecuted as required by the rules of the Supreme Court regulating such matters, after an examination of the record of errors appearing on its face. *State v. Taylor*, 194 N.C. 738, 140 S.E. 728 (1927); *State v. Thomas*, 195 N.C. 458, 142 S.E. 474 (1928); *State v. Clyburn*, 195 N.C. 618, 143 S.E. 129 (1928); *State v. Newsome*, 196 N.C. 16, 144 S.E. 300 (1928); *State v. Sentell*, 208 N.C. 140, 179 S.E. 456 (1935); *State v. Day*, 215 N.C. 566, 2 S.E.2d 569 (1939); *State v. Mayes*, 216 N.C. 542, 5

S.E.2d 722 (1939); *State v. Moore*, 216 N.C. 543, 5 S.E.2d 719 (1939); *State v. Mitchell*, 216 N.C. 544, 5 S.E.2d 723 (1939); *State v. Young*, 216 N.C. 626, 5 S.E.2d 847 (1939); *State v. Morrow*, 220 N.C. 441, 17 S.E.2d 507 (1941); *State v. Blue*, 221 N.C. 36, 18 S.E.2d 697 (1942); *State v. Wilfong*, 222 N.C. 746, 24 S.E.2d 629 (1943). See *State v. Alexander*, 224 N.C. 478, 31 S.E.2d 357 (1944); *State v. Taylor*, 224 N.C. 479, 31 S.E.2d 367 (1944); *State v. Buchanan*, 224 N.C. 626, 31 S.E.2d 774 (1944); *State v. Brooks*, 224 N.C. 627, 31 S.E.2d 754 (1944).

Extension of Time for Filing.—To avoid dismissal, the appellant must get his appeal docketed within time, but the Supreme Court may, in its discretion, grant further time for filing the record if appellant filed the record proper in time and then moves for certiorari, showing delay was not attributable to him. *Paris v. Carolina Portable Aggregates, Inc.*, 271 N.C. 471, 157 S.E.2d 131 (1967).

Certiorari to Preserve Right of Appeal.—See *State v. Jones*, 225 N.C. 363, 34 S.E.2d 202 (1945).

Appellee Must Obey Rules.—A motion to dismiss an appeal upon the ground that the appellant did not cause the same to be docketed in accordance with Rule 5 will not be granted where it appears that the appellee has also failed to comply with its requirements. One who seeks benefit under the rule must himself observe it. *Barbee v. Green*, 91 N.C. 158 (1884).

When Motion May Be Made.—A motion to docket and dismiss an appeal may be made at the beginning of the call of the district to which it belongs, or at any time thereafter during the term. In *re Burwell's Will*, 123 N.C. 125, 31 S.E. 382 (1898).

A motion to dismiss an appeal in the Supreme Court for failure of appellant to docket in the time required is in apt time when it is made during the term of Court to which the appeal is returnable, and before the case is docketed. *Standard Mirror Co. v. Philadelphia Cas. Co.*, 157 N.C. 28, 72 S.E. 826 (1911).

A motion by the appellee to docket and dismiss made before the docketing of the transcript, though not at the first opportunity, will be allowed. *Worth v. City of Wilmington*, 131 N.C. 532, 42 S.E. 964 (1902).

When Motion Allowed in Capital Case.—In a capital case, where the time for bringing up the case on appeal has expired, in the absence of any apparent error in the record before the Court, the motion of the Attorney General to docket and

dismiss, under this rule, is allowed. *State v. Poole*, 223 N.C. 394, 26 S.E.2d 858 (1943).

Where appellant did not docket the appeal or file transcript of the record on appeal within the time allowed, and failed to comply with mandatory rules of practice in the Supreme Court, the motion of the Attorney General to docket and dismiss will be allowed, but in a capital case this will be done only after a careful examination of the whole record fails to disclose error. *State v. Scriven*, 232 N.C. 198, 59 S.E.2d 428 (1950). See *State v. Hall*, 233 N.C. 310, 63 S.E.2d 636 (1951).

Where defendant fails to file statement of case on appeal or apply for writ of certiorari within the time allowed, the appeal will be dismissed on motion of the Attorney General, but where defendant has been convicted of a capital felony this will be done only after an inspection of the record proper fails to show error. *State v. Garner*, 230 N.C. 66, 51 S.E.2d 895 (1949); *State v. Lewis*, 230 N.C. 539, 53 S.E.2d 528 (1949).

Where a defendant convicted of a capital felony fails to file case on appeal in the superior court, the motion of the Attorney General to docket and dismiss, made after expiration of time agreed for perfecting the appeal and any extension of time which may have been granted, will be allowed after a careful inspection of the record proper fails to disclose error. *State v. Nelson*, 226 N.C. 529, 39 S.E.2d 391 (1946).

Appellant Not Entitled to Notice.—An appellee entitled to move for the dismissal of an appeal because of appellants' failure to file transcript of record within the required time, is not required to give appellants notice of such motion. *Johnston v. Whitehead*, 109 N.C. 207, 13 S.E. 731 (1891); *Kerr v. Drake*, 182 N.C. 764, 108 S.E. 393 (1921).

Laches of Appellant.—Where the appellant was guilty of laches for putting off his application for the transcript of record until just before the time when it should have been sent up for hearing, and further when the clerk delayed in making out the transcript, he did not take steps to have it made out himself and certified by the clerk, the motion to dismiss under this rule will be granted. *Johnson v. Covington*, 178 N.C. 658, 100 S.E. 881 (1919).

Case Docketed before Motion to Dismiss.—See *Standard Mirror Co. v. Philadelphia Cas. Co.*, 157 N.C. 28, 72 S.E. 826 (1911); *Gupton v. Sledge*, 161 N.C. 213, 76 S.E. 527 (1912); *McLean v. McDonald*, 175 N.C. 418, 95 S.E. 769 (1918). See also

Benedict v. Jones, 131 N.C. 473, 42 S.E. 909 (1902); *Laney v. Mackey*, 144 N.C. 630, 57 S.E. 386 (1907).

Necessity of Clerk's Certificate.—See *Mitchell v. Melton*, 178 N.C. 87, 100 S.E. 124 (1919).

Certificate Need Not Be Duplicated.—Where the appellant has filed a certificate of the clerk below that the case has been tried there, giving the names of the parties, and unsuccessfully applied for a certiorari in the Supreme Court, it is not necessary to appellee's motion to dismiss, that he should duplicate the certificate. *Lindsay v. Supreme Lodge of Knights of Honor*, 172 N.C. 818, 90 S.E. 1013 (1916).

Duty of Clerk Where Judgment Stayed but Appeal Not Docketed.—Even though execution of the judgment is stayed, unless the defendant shall proceed further and docket the appeal within the time prescribed by Rule 5, the clerk of the superior court wherein the case is tried should certify the facts to the Attorney General of the State, to the end that he may move to docket and dismiss the appeal under this rule. *State v. Watson*, 208 N.C. 70, 179 S.E. 455 (1935).

Clerk Cannot Refuse to Sign Certificate.—Where the transcript of appeal was not docketed in the time required, and the appellee prepared the certificate required by this rule, for motion to dismiss, and forwarded it to the clerk of the trial court, with a request that he sign the same, the clerk had no right to decline to sign and return the certificate because plaintiff's counsel had two weeks previously paid him \$20 on account for the making out of a transcript and requested that he prepare the same. *Johnson v. Covington*, 178 N.C. 658, 100 S.E. 881 (1919).

Case on Appeal Unnecessary.—A motion to docket and dismiss an appeal will be allowed where no transcript has been docketed, and no case on appeal is necessary to entitle appellee to such dismissal. *S.R. Fowle & Son v. Mitchell*, 149 N.C. 581, 62 S.E. 311 (1908).

Time of Stating Excuse.—Where a motion to docket and dismiss an appeal is made by appellee, for appellant's failure to docket the case, excuses for failure to docket should be then made. *British & Am. Mortgage Co. v. Long*, 116 N.C. 77, 20 S.E. 964 (1895); *McNeil v. Virginia-Carolina R.R.*, 173 N.C. 729, 92 S.E. 484 (1917).

Agreement of Parties.—Where the parties have entered into a written agreement or an oral agreement not denied, that the appellee will not move to dismiss under this rule the Supreme Court will uphold the agreement and a motion to dismiss

will be denied. *McNeil v. Virginia-Carolina R.R.*, 173 N.C. 729, 92 S.E. 484 (1917).

When Appellant Has Abandoned Appeal.—When it appears from the record on file in the Supreme Court that the appellant has abandoned his appeal below, no motion to dismiss is necessary, and it will therefore be disallowed. *Standard Mirror Co. v. Philadelphia Cas. Co.*, 157 N.C. 28, 72 S.E. 826 (1911).

Requisites of Motion to Reinstate.—See *Pipkin v. Green*, 112 N.C. 355, 17 S.E. 534 (1893).

Where an appeal has been dismissed under this rule, the appellant, applying for a reinstatement upon the ground that the trial judge has failed to settle the case, must show that he has had his record proper docketed in this Court, as required by the rules, or his motion will be denied. *Caudle v. Morris*, 158 N.C. 594, 74 S.E. 98 (1912).

A motion to reinstate a case on appeal must be denied when based on the same grounds upon which it was properly dismissed. *McDowell v. Kent*, 153 N.C. 555, 69 S.E. 626 (1910).

Where an appeal has been dismissed for failure to docket the transcript on appeal in proper time, it will not be reinstated upon the ground that appellant's counsel was prevented from appearing to settle the case before the trial judge on the days designated for the purpose, by other urgent business of his client, the appellant, requiring his presence elsewhere. *Parker v. Southern Ry.*, 121 N.C. 501, 28 S.E. 347 (1897).

Applied in *Barbee v. Green*, 91 N.C. 158 (1884); *Rollins v. Love*, 97 N.C. 210, 2 S.E. 166 (1887); *Bailey v. Brown*, 105 N.C. 127, 10 S.E.2d 1054 (1890); *Avery v. Pritchard*, 106 N.C. 344, 11 S.E. 281 (1890); *Porter v. Western N.C.R.R.*, 106 N.C. 478, 11 S.E. 515 (1890); *Hinton v. Pritchard*, 108 N.C. 412, 12 S.E. 838 (1891); *Graham v. Edwards*, 114 N.C. 228, 19 S.E. 150 (1894); *Truelove v. Norris*, 152 N.C. 755, 67 S.E. 487 (1910); *Rosemond v. McPherson*, 156 N.C. 593, 72 S.E. 570 (1911); *Jordan v. Simmons*, 175 N.C. 537, 95 S.E. 919 (1918); *State v. Williams*, 216 N.C. 740, 6 S.E.2d 492 (1940); *State v. Page*, 217 N.C. 288, 7 S.E.2d 559 (1940); *State v. Flynn*, 217 N.C. 345, 7 S.E.2d 700 (1940); *State v. Gibson*, 217 N.C. 563, 8 S.E.2d 804 (1940); *State v. Daniels*, 231 N.C. 509, 57 S.E.2d 653 (1950); *Woody v. Barnett*, 235 N.C. 73, 68 S.E.2d 810 (1952); *State v. Miller*, 235 N.C. 394, 70 S.E.2d 2 (1952); *State v. Brown*, 263 N.C. 786, 140 S.E.2d 413 (1965); *State v. Potts*, 266 N.C. 117,

145 S.E.2d 307 (1965); *State ex rel. Northwestern Bank v. Fidelity & Cas. Co.*, 268 N.C. 234, 150 S.E.2d 396 (1966).

Cited in *State v. Baldwin*, 221 N.C. 471,

20 S.E.2d 298 (1942); *Brown v. Allen*, 344 U.S. 443, 73 S. Ct. 397, 437, 97 L. Ed. 469 (1953).

(1) Appeal Docketed by Appellee When Frivolous and Taken for Purposes of Delay. The Transcript of an appeal which is obviously frivolous and appears to have been taken only for purposes of delay, may be docketed in this Court by appellee before the time required by Rule 5, and if it appears to the Court that the appellee's contention is correct, the appeal will be dismissed at cost of appellant.

Cross Reference.—As to appeals the Supreme Court will consider, see analysis line II, C of note to § 1-277.

Frivolous Appeal Dismissed.—While ordinarily an appeal lies to the Supreme Court from the superior court as a matter of right, it is required that it must be bona fide for the purpose of reviewing some alleged error; and when from the record it appears that the appeal is frivolous and made solely for delay, it will, upon due notice to the appellant, be dismissed upon appellee's motion. *Ludwick v. Unwarra Mining Co.*, 171 N.C. 60, 87 S.E. 949 (1916); *Blount v. Jones*, 175 N.C. 708, 95 S.E. 541 (1918); *Headman v. Board of Comm'rs*, 177 N.C. 261, 98 S.E. 776 (1919); *Ross v. Robinson*, 185 N.C. 548, 118 S.E. 4 (1923).

Instant Relief for Appellee. — Where the appellee has moved to dismiss the appeal, showing that appellant's defense was frivolous and only for advantages to be gained by delay to the appellee's loss, and that the appellant had lost the right to have the case settled on appeal to the

Supreme Court, and his answer to the motion is also frivolous, the Supreme Court will affirm the judgment in appellee's favor rendered in the trial court, and order the judgment to be certified down instantler to afford the appellee relief from the appellant's abuse of the Supreme Court's process and procedure. *Selwyn Hotel Co. v. Griffin*, 182 N.C. 539, 109 S.E. 371 (1921).

When Statement of Case Contains No Assignments of Error.—Where the agreed statement of case on appeal contains no exceptions or assignments of error, making it apparent that the appeal was taken solely for the purpose of delay, appellee's motion to docket and dismiss under this rule will be allowed. *Stephenson v. Watson*, 226 N.C. 742, 40 S.E.2d 351 (1946).

Applied in *Kernodle v. Boney*, 260 N.C. 774, 133 S.E.2d 697 (1963); *State v. Brown*, 263 N.C. 786, 140 S.E.2d 413 (1965); *State v. Potts*, 266 N.C. 117, 145 S.E.2d 307 (1965).

Cited in *Doss v. Nowell*, 268 N.C. 289, 150 S.E.2d 394 (1966).

18. Appeal Docketed and Dismissed Not to Be Reinstated Until Appellant Has Paid Costs

When an appeal is dismissed by reason of the failure of the appellant to bring up a transcript of the record, and the same, or a certificate for that purpose, as allowed by Rule 17, is procured by appellee, and the case dismissed, no order shall be made setting aside the dismissal or allowing the appeal to be reinstated, even though the appellant may be otherwise entitled to such order, until the appellant shall have paid or offered to pay the costs of the appellee in procuring the certificate and in causing the same to be docketed.

Cross References.—As to costs on appeal generally, see § 6-33 et seq. As to undertaking required on appeal, see § 1-285 et seq.

19. Transcripts

(1) What to Contain and How Arranged. In every transcript record of an action brought to this Court, the proceedings shall be set forth in the order of time in which they occurred, and the several processes, orders, and every document constituting the transcript shall be identified by a proper title or heading, and shall be arranged to follow each other in the order the same took place, when practicable. The pages shall be numbered, and on the front page of the record there shall be an index in the following or some equivalent form:

	Page
Summons—date	1
Complaint—first cause of action	2
Complaint—second cause of action	3
Affidavit for attachment, etc.	4

It shall not be necessary to send as a part of the transcript, affidavits, orders and other processes and proceedings in the action not involved in the appeal and not necessary to an understanding of the exceptions relied on. Counsel may sign an agreement which shall be made a part of the record as to the parts to be transcribed, and in the event of disagreement of counsel the judge of the Superior Court shall designate the same by written order: Provided, that the pleadings on which the case is tried, the issues, and the judgment appealed from shall be a part of the transcript in all cases: Provided, further, that this rule is subject to the power of this Court to order additional papers and parts of the record to be sent up.

Effective January 1, 1964, every pleading, motion, affidavit, or other document included in the transcript on appeal shall plainly show the date of the verification and the name of the person who verified it. Every order and judgment shall show the date on which it was signed and filed. If this information is not furnished the transcript may be considered insufficient and dealt with as provided in subsection (10).

Cross Reference.—As to contents of case on appeal, see §§ 1-282, 1-283 and notes thereto.

Rules of practice in the Supreme Court are mandatory and will be enforced. Lewis v. Parker, 268 N.C. 436, 150 S.E.2d 729 (1966); In re Will of Adams, 268 N.C. 565, 151 S.E.2d 59 (1966).

The omission of the essential parts of a transcript, as required by this rule, is fatal to the appeal. Allen v. Allen, 235 N.C. 554, 70 S.E.2d 505 (1952).

Purpose of Rule.—It is the duty of the courts to prevent the imposition by either party of unnecessary costs upon the other. It is for this reason that the rule designates what matter is unnecessary to be sent up, and prescribes that the evidence on appeal shall be set out in narrative form. Waldo v. Wilson, 177 N.C. 461, 100 S.E. 182 (1919).

Proceedings Not Set Forth in Regular Order.—Where the transcript does not set forth the proceedings in the order of time in which they occur, and the record shows no error warranting an order for a new trial, the appeal will be dismissed on motion. Hobbs v. Cashwell, 158 N.C. 597, 74 S.E. 23 (1912).

Filing Date of Every Document Required.—This rule requires, inter alia, that the filing date of every pleading, motion, affidavit or other document in the transcript on appeal shall appear. Oliver v. Williams, 266 N.C. 601, 146 S.E.2d 648 (1966).

The pages of the record in an appeal in forma pauperis must be numbered. Pearce v. Hewitt, 261 N.C. 408, 134 S.E.2d 662 (1964).

An index of exhibits solely by the alphabetical designation of such exhibits does not comply with this rule of practice. Millwood v. Firestone Cotton Mills, 215 N.C. 519, 2 S.E.2d 560 (1939).

Failure to Index.—Appeals will be dismissed where no index is sent up in the record and printed and no marginal references prepared. Sigman v. Southern R.R., 135 N.C. 181, 47 S.E. 420 (1904); Kearnes v. Gray, 173 N.C. 717, 92 S.E. 149 (1917). See also Alexander v. Alexander, 120 N.C. 472, 27 S.E. 121 (1897); Pretzfelder v. Merchants Ins. Co., 123 N.C. 164, 31 S.E. 470 (1898).

Pleadings, Issues and Judgment a Part of Record.—The rules of practice in the Supreme Court require among other things that the pleadings, issues and judgment shall be a part of the record proper, and this appeal, the record not including the summons or complaint, and the Court, consequently, not being informed as to the nature of the action, is dismissed. Waters v. Waters, 199 N.C. 667, 155 S.E. 564 (1930). See Goodman v. Goodman, 208 N.C. 416, 181 S.E. 328 (1935); Washington County v. Norfolk S. Land Co., 222 N.C. 637, 24 S.E.2d 338 (1943).

The pleadings are an essential part of the record in order that the Supreme Court may be advised as to the nature of the action or proceeding. Allen v. Allen, 235 N.C. 554, 70 S.E.2d 505 (1952).

Essential Parts of Transcript in Criminal Cases.—On appeal in criminal cases, the indictment or warrant and plea on which the case is tried, the verdict and the judgment appealed from are essential parts of

the transcript. *State v. Jenkins*, 234 N.C. 112, 66 S.E.2d 819 (1952); *State v. Stubbs*, 265 N.C. 420, 144 S.E.2d 262 (1965).

Where the pleadings and the referee's report have been omitted from the record, the appeal must be dismissed as not conforming to this rule. *Payne v. Brown*, 205 N.C. 785, 172 S.E. 348 (1934).

The pleadings are a necessary part of the record proper upon appeal, and where the pleadings are omitted from the record, the appeal must be dismissed. *State v. Ravensford Lumber Co.*, 207 N.C. 47, 175 S.E. 713 (1934); *Griffin v. Barnes*, 242 N.C. 306, 87 S.E.2d 560 (1955).

Jurisdiction of Trial Court Should Appear.—In order to sustain an appeal to the Supreme Court it is essential that the jurisdiction of the trial court should be made to appear. *State v. Patterson*, 222 N.C. 179, 22 S.E.2d 267 (1942).

Where the record fails to disclose jurisdiction in the court below, the Supreme Court acquires no jurisdiction by appeal, and the appeal must be dismissed. *State v. Banks*, 241 N.C. 572, 86 S.E.2d 76 (1955).

Submission of Controversy without Action.—Upon appeal from judgment entered in a submission of controversy without action, the agreed facts with the required affidavits are necessary parts of the record proper. *Consolidated Realty Corp. v. Koon*, 215 N.C. 459, 2 S.E.2d 360 (1939).

Transcript of Indictment Must Appear in Record.—Where an appeal is taken to the refusal of the trial court to quash an indictment, it is the duty of the appellant to see that a transcript of the indictment appears in the record; and when it does not so appear he should apply to the superior court to supply it, if one convenes in time; and if not, he should send to the Supreme Court as much of the record as could be procured, and apply here for a certiorari to give him opportunity to move in the court below. *State v. McDraughon*, 168 N.C. 131, 83 S.E. 181 (1914).

Verified Answer Attached to Motion to Set Aside Default Judgment.—On appeal from an order setting aside a default judgment upon the court's finding of surprise and a meritorious defense, the verified answer of defendant, which was attached to and made a part of the motion to set aside the judgment, is a necessary part of the record proper, and on failure to send it up the appeal will be dismissed, since in the absence of the answer it cannot be determined whether the finding of a meritorious defense was supported by evidence. *Mooneyham v. Mooneyham*, 249 N.C. 641, 107 S.E.2d 66 (1959).

Copy of Judgment Omitted.—Where on

appeal no printed copy of the judgment accompanies the record, the appeal will be dismissed under this rule. *Wiley v. Bessemer City Mining Co.*, 117 N.C. 489, 23 S.E. 448 (1895).

Case Decided on False Record.—Where a criminal case is decided in the Supreme Court on a record afterwards found to be false, it will be restored to the docket and a certiorari issued to correct the record. *State v. Marsh*, 134 N.C. 184, 47 S.E. 6 (1903).

Transcript Failing to Meet Requirements of This Rule.—See *Smoak v. Newton*, 234 N.C. 451, 67 S.E.2d 462 (1951).

Dismissal of Appeal.—The case on appeal to the Supreme Court will be dismissed when the transcript does not conform to the rules of Court regulating appeals. *Bridgers v. Griffin*, 195 N.C. 862, 142 S.E. 221 (1928); *In re Adoption of Anderson*, 251 N.C. 176, 110 S.E.2d 832 (1959).

Under this rule the complaint is a necessary part of the record proper, and when it is not contained therein, the case on appeal will be dismissed. *Schwarberg v. Howard*, 197 N.C. 126, 147 S.E. 741 (1929); *J.O. Plott Co. v. H.K. Ferguson Constr. Co.*, 198 N.C. 782, 153 S.E. 396 (1930); *Thrush v. Thrush*, 245 N.C. 63, 94 S.E.2d 897 (1956); *Williams v. Asheville Contracting Co.*, 259 N.C. 232, 130 S.E.2d 340 (1963).

Where on appeal the record contains only a synopsis of the complaint, the appeal will be dismissed. *J.O. Plott Co. v. H.K. Ferguson Constr. Co.*, 198 N.C. 782, 153 S.E. 396 (1930).

Where the record does not show either the organization of the court below or the authority of the special judge who signed the judgment, nor disclose that the judgment was entered at term, the appeal is dismissible under this rule. *Vail v. Stone*, 222 N.C. 431, 23 S.E.2d 329 (1942).

Motion to Reinstate.—A motion to reinstate a case on appeal that has been dismissed on appellee's motion, for nonconformity with the rules of the Court requiring the record to be indexed, and to show the appellant's exceptions under proper assignments of error in accordance with the manner specified, will be denied, when the granting of the motion would not cure the defects. *Redding v. Dunn*, 185 N.C. 311, 117 S.E. 26 (1923).

Applied in Ericson v. Ericson, 226 N.C. 474, 38 S.E.2d 517 (1946); *Wayne County Bd. of Educ. v. Lewis*, 231 N.C. 661, 58 S.E.2d 725 (1950); *Royals v. Baggett*, 262 N.C. 541, 138 S.E.2d 141 (1964); *Miller v. Miller*, 270 N.C. 140, 153 S.E.2d 854 (1967).

Stated in Pace v. Pace, 244 N.C. 698,

94 S.E.2d 819 (1956); *Patterson v. Buchanan*, 265 N.C. 214, 143 S.E.2d 76 (1965).

Cited in *State v. Avery*, 236 N.C. 276, 72 S.E.2d 670 (1952); *Brown v. Allen*, 344 U.S. 443, 73 S. Ct. 397, 97 L. Ed. 469 (1953); *Stowe v. Burke*, 255 N.C. 527,

122 S.E.2d 374 (1961); *Paschal v. Austry*, 256 N.C. 166, 123 S.E.2d 569 (1962); *State v. Potts*, 266 N.C. 117, 145 S.E.2d 307 (1965); *State v. Colson*, 274 N.C. 295, 163 S.E.2d 376 (1968).

(2) **Two Appeals.** When there are two or more appeals in one action it shall not be necessary to have more than one transcript, but the statements of cases on appeal shall be settled as now required by law, and shall appear separately in the transcript. The judge of the Superior Court shall determine the part of the costs of making the transcript to be paid by each party, subject to the right to recover such costs in the final judgment as now provided by law.

Where indictments relating to one offense against several defendants are properly consolidated for trial, only one record should be filed on the appeals of defendants. *State v. Jackson*, 226 N.C. 760, 40 S.E.2d 417 (1946).

Where two defendants are jointly tried for the same offense upon a joint indictment, only a single transcript should be docketed upon their respective appeals. *State v. Frazier*, 268 N.C. 249, 150 S.E.2d 431 (1966).

Where two separate actions which cannot be joined in the same action are tried together for convenience but not consolidated by the trial court into one action, separate appeals should be taken and sepa-

rate records filed by the respective applicants, and this rule is not applicable. *Osborne v. Canton*, 219 N.C. 139, 13 S.E.2d 265 (1941).

Marginal References.—There must be printed on the margin, or as subheads, of each transcript of record a brief statement of the subject matter contained therein, and such marginal references or subheads embrace also the duty of numbering the exceptions. *Brinkley v. Smith*, 130 N.C. 224, 41 S.E. 106 (1902).

Cited in *Hoke v. Atlantic Greyhound Corp.*, 227 N.C. 412, 42 S.E.2d 593 (1947); *Golston v. Chambers*, 272 N.C. 53, 157 S.E.2d 676 (1967).

(3) **Exceptions Grouped.** All exceptions relied on shall be grouped and separately numbered immediately before or after the signature to the case on appeal. Exceptions not thus set out will be deemed to be abandoned. If this rule is not complied with, and the appeal is not from a judgment of nonsuit, it will be dismissed, or the Court will in its discretion refer the transcript to the clerk or to some attorney to state the exceptions according to this rule, for which an allowance of not less than \$5 will be made, to be paid in advance by the appellant; but the transcript will not be so referred or remanded unless the appellant file with the clerk a written stipulation that the appeal shall be heard and determined on printed briefs under Rule 10, if the appellee shall so elect.

Cross References.—See note to Rule 21. As to exceptions generally, see § 1-186 and note thereto. See note to Rule 4(a).

This rule and Rule 21 apply to all appeals, whether they come to the Supreme Court by writ or in regular order. *Williams v. Williams*, 261 N.C. 48, 134 S.E.2d 227 (1964).

Rules Mandatory.—This rule and Rule 21, relating to assignments of error and exceptions, are mandatory. *Pamlico County v. Davis*, 249 N.C. 648, 107 S.E.2d 306 (1959); *Darden v. Bone*, 254 N.C. 599, 119 S.E.2d 634 (1961); *Kleinfeldt v. Shoney's of Charlotte, Inc.*, 257 N.C. 791, 127 S.E.2d 573 (1962).

The rules of practice of the Supreme Court are mandatory. *Jim Walter Corp. v. Gilliam*, 260 N.C. 211, 132 S.E.2d 313 (1963).

An assignment of error must be based

upon an exception duly taken, in apt time, during the trial and preserved as required by this rule and Rule 21. *State v. Strickland*, 254 N.C. 658, 119 S.E.2d 781 (1961).

This rule and Rule 21 require that asserted error must be based on an appropriate exception, and must be properly assigned. These rules of practice in the Supreme Court are mandatory and will be enforced. *State v. Benton*, 276 N.C. 641, 174 S.E.2d 793 (1970).

An assignment of error is worthless unless it is based upon an exception duly taken in apt time during the trial and preserved as required by this rule and Rule 21. *Knutton v. Cofield*, 273 N.C. 355, 160 S.E.2d 29 (1968).

The purpose of this rule which requires that each assignment of error itself disclose with particularity the specific matters alleged as error without requiring "a voyage

of discovery" through an often voluminous record, is twofold: (1) To enable the members of the Supreme Court, in their preargument examination of the record, to ascertain the questions involved in the appeal and thus to obtain maximum benefits from the arguments; (2) to reduce the possibility that an error in the trial below will escape detection. *State v. Douglas*, 268 N.C. 267, 150 S.E.2d 412 (1966).

Rule Strictly Adhered to.—The requirement that errors relied on be assigned in the record, and that the exceptions relied on shall be grouped, numbered, and set out immediately after the statement of the case on appeal, must be strictly adhered to, except when the appeal is on the ground the judgment was not justified by the facts found or admitted, or that the court did not have jurisdiction. *Sigman v. Southern R.R.*, 135 N.C. 181, 47 S.E. 420 (1904); *Pegram v. Hester*, 152 N.C. 765, 68 S.E. 8 (1910); *Owens v. Hines*, 178 N.C. 325, 100 S.E. 617 (1919).

Assignment of Error Necessary.—Appellee's motion to dismiss the appeal will be allowed when the record contains no assignment of error. *Hobbs v. Hobbs*, 218 N.C. 468, 11 S.E.2d 311 (1940).

Where the record contains no assignments of error, this is ground for dismissal for failure to comply with this rule. *Eastern Steel Prods. Corp. v. Chestnutt*, 252 N.C. 269, 113 S.E.2d 587 (1960); *Williams v. Denning*, 260 N.C. 540, 138 S.E.2d 148 (1963).

This rule and Rule 21 require that asserted error must be based on an appropriate exception, and must be properly assigned. *Lewis v. Parker*, 268 N.C. 436, 150 S.E.2d 729 (1966).

Or Judgment Below Will Be Sustained.—Where the case on appeal contains no assignments of error as required by this rule, unless error appears on the face of the record proper, or the issues are insufficient to support the judgment entered, the judgment will be sustained. *Anson Bank & Trust Co. v. Henry*, 267 N.C. 253, 148 S.E.2d 7 (1966).

In the absence of assignments of error in the record or brief, the judgment below will be sustained in the absence of error appearing on the face of the record proper. *State v. Williams*, 268 N.C. 295, 150 S.E.2d 447 (1966).

Assignments of error to the charge should quote the portion of the charge to which appellant objects, and assignments based on failure to charge should set out appellant's contention as to what the Court should have charged. *State v. Kirby*, 276 N.C. 123, 171 S.E.2d 416 (1970).

An assignment of error relating to restrictions placed on cross-examination does not comply with this rule and Rule 21 if it does not contain any question put to any witness on cross-examination. *State v. Kirby*, 276 N.C. 123, 171 S.E.2d 416 (1970).

The questions arising on an appeal are those defined by appropriate exceptions taken by the appellant in the superior court. *Sprinkle v. City of Reidsville*, 235 N.C. 140, 69 S.E.2d 179 (1952).

Not Sufficient to Show Exceptions in Record.—This rule is not complied with by showing in the record the various exceptions numbered, but on different pages, when there is no assignment of errors at the end of the case, either before or after the judge's signature; and the appeal will be dismissed. *Jones v. Atlantic Coast Line R.R.*, 153 N.C. 419, 69 S.E. 427 (1910). See *State v. Biggerstaff*, 226 N.C. 603, 39 S.E.2d 619 (1946).

This rule and Rule 21 require an assignment of error to show specifically what question is intended to be presented for consideration without the necessity of going beyond the assignment of error itself. A mere reference in the assignment of error to the record page where the asserted error may be discovered is not sufficient. *Lewis v. Parker*, 268 N.C. 436, 150 S.E.2d 729 (1966); *In re Will of Adams*, 268 N.C. 565, 151 S.E.2d 59 (1966); *State v. Benton*, 276 N.C. 641, 174 S.E.2d 793 (1970).

Assignments Not Supported by Exceptions Therein Noted Will Not Be Considered.—Assignments of error not supported by exceptions therein noted cannot be considered. The Supreme Court will not search through a record in an effort to determine whether or not it contains an exception or exceptions that will sustain the assignments. *State v. Worley*, 246 N.C. 202, 97 S.E.2d 837 (1957).

The Supreme Court will not consider assignments not based on specific exceptions and which do not comply with its rules. *Darden v. Bone*, 254 N.C. 599, 119 S.E.2d 634 (1961).

Assignments of error not supported by exceptions present no question of law for the Supreme Court to decide. *Corns v. Nickelston*, 257 N.C. 277, 125 S.E.2d 588 (1962).

An assignment of error not supported by an exception is ineffectual. *Vance v. Hampton*, 256 N.C. 557, 124 S.E.2d 527 (1962).

Reason for Requiring Designation of Exceptions.—The reason which requires appellant in the case on appeal to assign or designate the exceptions on which he will rely is apparent. Appellee is entitled to

know which of the exceptions taken appellant intends to rely on, so that there may be included in the record such parts as may be necessary to show that there was in fact no error. *Conrad v. Conrad*, 252 N.C. 412, 113 S.E.2d 912 (1960).

What the Supreme Court requires is that exceptions which are presented to the Court for decision shall be stated clearly and intelligibly by the assignment of error, and not by referring to the record, and therewith there shall be set out so much of the evidence or other matter of circumstance as shall be necessary to present clearly the matter to be debated. In this way the scope of inquiry is narrowed to the identical points which the appellant thinks are material and essential, and the Court is not sent scurrying through the entire record to find the matters complained of. *Darden v. Bone*, 254 N.C. 599, 119 S.E.2d 634 (1961); *Pratt v. Bishop*, 257 N.C. 486, 126 S.E.2d 597 (1962).

Where the exceptions appear in the record only under the assignments of error, they are ineffectual, since the rules require that assignments of error be based upon exceptions previously noted, and the rules are mandatory and will be enforced *ex mero motu*. *Bulman v. Southern Baptist Convention*, 248 N.C. 392, 103 S.E.2d 487 (1958).

Purported exceptions appearing nowhere except in the assignments of error will not be considered on appeal. *Vance v. Hampton*, 256 N.C. 557, 124 S.E.2d 527 (1962).

The exceptions must be grouped in the assignments of error. *Williams v. Denning*, 260 N.C. 539, 133 S.E.2d 150 (1963).

Where appellant's exceptions are not grouped as required by this rule and Rule 21, they may not be considered. *Balint v. Grayson*, 256 N.C. 490, 124 S.E.2d 364 (1962).

Assignments Must Point Out the Error Relied Upon.—Purported assignments of error will not be considered by the Court where they do not throw the slightest light on the questions the Court is asked to pass upon. *Tillis v. Calvine Cotton Mills, Inc.*, 244 N.C. 587, 94 S.E.2d 600 (1956); *State v. Reel*, 254 N.C. 778, 119 S.E.2d 876 (1961).

The error relied upon should be definitely and clearly presented, and the Court should not be compelled to go beyond the assignment itself to learn what the question is. *Allen v. Allen*, 244 N.C. 446, 94 S.E.2d 325 (1956); *State v. Mills*, 244 N.C. 487, 94 S.E.2d 324 (1956); *Tillis v. Calvine Cotton Mills, Inc.*, 244 N.C. 587, 94 S.E.2d 600 (1956); *Armstrong v. Howard*, 244 N.C.

598, 94 S.E.2d 594 (1956); *Nichols v. McFarland*, 249 N.C. 125, 105 S.E.2d 294 (1958); *Phillips v. North Carolina R.R.*, 257 N.C. 239, 125 S.E.2d 603 (1962); *Pratt v. Bishop*, 257 N.C. 486, 126 S.E.2d 597 (1962); *State v. Mohrmann*, 265 N.C. 594, 144 S.E.2d 645 (1965); *State v. Oliver*, 268 N.C. 280, 150 S.E.2d 445 (1966).

Assignments of error which are insufficient to present the errors relied upon without the necessity of going beyond the assignments themselves to learn what the questions are do not comply with this rule. *Jones v. Saunders*, 257 N.C. 118, 125 S.E.2d 350 (1962).

This rule and Rule 21 require the assignment of error to show what question is intended to be presented for consideration without the necessity of paging through the record to find the asserted error. A mere reference in the assignment of error to the record page where the asserted error may be discovered is not sufficient. *Hunt v. Davis*, 248 N.C. 69, 102 S.E.2d 405 (1958); *Douglas v. W.C. Mallison & Son*, 265 N.C. 362, 144 S.E.2d 138 (1965).

This rule and Rule 21 require an assignment of error to state clearly and intelligently what question is intended to be presented without the necessity of the Court going beyond the assignment of error itself "on a voyage of discovery" through the record to find the asserted error and the precise question involved. *Kleinfeldt v. Shoney's of Charlotte, Inc.*, 257 N.C. 791, 127 S.E.2d 573 (1962).

Assignments of error do not comply with the requirements of this rule and are insufficient where they do not present the errors relied upon without the necessity of going beyond the assignments themselves to learn what the questions are, and the particular portions of the charge objected to are not specifically set out. *Hill v. Logan*, 262 N.C. 488, 137 S.E.2d 822 (1964).

An assignment of error must disclose the questions sought to be presented without the necessity of going beyond the assignment itself. *Nationwide Homes of Raleigh, N.C., Inc. v. First-Citizens Bank & Trust Co.*, 267 N.C. 528, 148 S.E.2d 693 (1966); *State v. Foster*, 268 N.C. 480, 151 S.E.2d 62 (1966).

An assignment of error which fails to disclose the question sought to be presented without the necessity of going beyond the assignment itself will not be considered. *Long v. Honeycutt*, 268 N.C. 33, 149 S.E.2d 579 (1966).

Assignments of error, when properly prepared, pinpoint the controversy. *State v.*

Douglas, 268 N.C. 267, 150 S.E.2d 412 (1966).

A mere reference in the assignment of error to the page of the record where the asserted error may be discovered is not a compliance with this rule. *Zopfi v. City of Wilmington*, 273 N.C. 430, 160 S.E.2d 325 (1968).

An assignment of error to the admission or exclusion of evidence must include so much of that testimony as will enable the Supreme Court to understand the question sought to be presented without the necessity of going beyond the assignment itself. *Grimes v. Home Credit Co.*, 271 N.C. 608, 157 S.E.2d 213 (1967).

The assignment should clearly present and specifically point out the alleged error relied upon without the necessity of going beyond the assignment itself to ascertain the question to be debated. *State v. Kirby*, 276 N.C. 123, 171 S.E.2d 416 (1970).

Always the very error relied upon shall be definitely and clearly presented, and the Court is not compelled to go beyond the assignment itself to learn what the question is. *State v. Henderson*, 276 N.C. 430, 173 S.E.2d 291 (1970).

The assignment must be so specific that the Court is given some real aid and a voyage of discovery through an often voluminous record not rendered necessary. *State v. Kirby*, 276 N.C. 123, 171 S.E.2d 416 (1970).

A mere reference in the assignment of error to the record page where the asserted error may be discovered fails completely to comply with this rule and Rule 21. *State v. Kirby*, 276 N.C. 123, 171 S.E.2d 416 (1970).

An assignment of error which attempts to present several questions of law is broadside and ineffective. *State v. Blackwell*, 276 N.C. 714, 174 S.E.2d 534 (1970).

Assignments of error as to the admission of evidence shall state with particularity the alleged incompetent evidence, and not require a search through the record to find the challenged evidence. *Bridges v. Graham*, 246 N.C. 371, 98 S.E.2d 492 (1957).

Exclusion of Evidence.—Assignments of error relating to the exclusion of evidence did not comply with this rule in that appellant did not incorporate therein the excluded evidence and thus disclose the alleged error. *Rural Plumbing & Heating, Inc. v. H.C. Jones Constr. Co.*, 268 N.C. 23, 149 S.E.2d 625 (1966).

The assignment of error should set forth, within itself, the question asked, the objection, the ruling on the objection, and what the witness would have answered if he had been permitted to testify. *Douglas v. W.C.*

Mallison & Son, 265 N.C. 362, 144 S.E.2d 138 (1965).

Where the record fails to show what the witness would have testified had he been permitted to answer questions objected to, the exclusion of such testimony is not shown to be prejudicial. This rule applies as well to questions asked on cross-examination. *State v. Kirby*, 276 N.C. 123, 171 S.E.2d 416 (1970).

Lack of Definiteness.—Where the charge covered 36 pages of the record, and all except 15 lines were made the subject of the 72 exceptions taken, and some of the exceptions related to two or more pages of the charge, the exceptions did not point up with the definiteness required by this rule. *State v. Stevens*, 244 N.C. 40, 92 S.E.2d 409 (1956).

When an exception relates to the charge, that portion to which the exception is taken must be set out in the particular assignment of error. A mere reference to the exception number and the page number of the record where the exception appears will not present the alleged error for review. *State v. Kirby*, 276 N.C. 123, 171 S.E.2d 416 (1970).

The exceptions which are bona fide shall be stated clearly and intelligibly by the assignment of errors and not by referring to the record, and therewith shall be set out so much of the evidence or of the charge or other matter or circumstance as shall be necessary to present clearly the matter to be debated. *State v. Kirby*, 276 N.C. 123, 171 S.E.2d 416 (1970).

An exception "to each conclusion of law embodied in the judgment" is a broadside exception and does not comply with this rule and § 1-186. *Jamison v. City of Charlotte*, 239 N.C. 682, 80 S.E.2d 904 (1954).

Appeal Itself Treated as Exception to Judgment.—Where the exceptions are not grouped, the assignments of error will not be considered, but the appeal itself will be treated as an exception to the judgment. *Ellis v. Atlantic Coast Line R.R.*, 241 N.C. 747, 86 S.E.2d 406 (1955).

When Only One Exception Taken.—An appeal will not be dismissed for non-compliance with this rule, requiring all the exceptions relied on to be set out immediately after the statement of the case on appeal, where the appellee was not prejudiced; there being only one exception taken, and that being stated in the record, though improperly. *Wall v. Holloman*, 156 N.C. 275, 72 S.E. 369 (1911).

When Error Plainly Apparent.—Where the exceptions are separately stated and numbered, but are not brought together at the end of the case, a motion by the ap-

pellee to affirm will be denied if the error intended to be assigned is plainly apparent. *Hicks v. Kenan*, 139 N.C. 337, 51 S.E. 941 (1905).

When Only Correctness of Judgment Questioned.—When the appeal calls in question only the correctness of the judgment, no summary of exceptions is required because it is error on the face of the record. *Wilson v. Beaufort County Lumber Co.*, 131 N.C. 163, 42 S.E. 565 (1902); *Ullery v. Guthrie*, 148 N.C. 417, 62 S.E. 552 (1908).

Where appeal is from a judgment of nonsuit it is not subject to dismissal under this rule. *Douglas v. W.C. Mallison & Son*, 265 N.C. 362, 144 S.E.2d 138 (1965).

Exceptions to Rulings Granting New Trial Should Be Specifically Stated in Case of Appeal to Supreme Court.—When an appeal is taken from the general county court to the superior court for errors assigned in matters of law, as authorized by § 7-295, and a new trial is granted by the superior court, it is essential that the rulings upon exceptions granting the new trial be specifically stated, so that in case of appeal to the Supreme Court they may be separately assigned as error in accordance with this rule, and properly considered on appeal. *Jenkins v. Castelloe*, 208 N.C. 406, 181 S.E. 266 (1935).

In *Watkins v. Grier*, 224 N.C. 334, 30 S.E.2d 219 (1944), it was held that any confusion there was in the transcript of the case on appeal to the Supreme Court, arose upon the merging of the proceedings in the trial in the municipal court with the proceedings had on appeal to superior court, without separate grouping of exceptions presented on such appeal.

Exceptions Not Set Out Deemed Abandoned.—This rule provides that all exceptions shall be grouped and separately numbered immediately before or after the signature to the case on appeal, and exceptions not thus set out are deemed abandoned. *State v. Biggerstaff*, 226 N.C. 603, 39 S.E.2d 619 (1946).

Exceptions not brought forward as separate assignments of error and not discussed in the brief are deemed abandoned. *Keith v. Wilder*, 241 N.C. 672, 86 S.E.2d 444 (1955).

Discretion of Supreme Court.—Where the exceptions are separately numbered and only one of them is necessary to be considered in disposing of the appeal, the Supreme Court in its discretion may dispose of the case on its merits notwithstanding failure of appellant to separately assign the exceptions as error. *Aydlett v. Keim*, 232 N.C. 367, 61 S.E.2d 109 (1950).

The Supreme Court, in the exercise of its supervisory jurisdiction, may decide questions on the merits even though the procedure prescribed by the rules of practice as necessary to present such questions has not been followed. *Eastern Steel Prods. Corp. v. Chestnutt*, 252 N.C. 269, 113 S.E.2d 587 (1960).

While not in strict compliance with this rule, plaintiff's assignments of error are specific and definite. Since the rules of the supreme court are made for the court's convenience and in dispatch of its appellate jurisdiction, the Supreme Court will consider appellant's assignment of error. *Gardner v. City of Reidsville*, 269 N.C. 581, 153 S.E.2d 139 (1967).

In Capital Case.—Where defendant's exceptions are not brought forward and grouped as required by this rule, the appeal will be dismissed, but where defendant has been convicted of a capital crime this will be done only after an inspection of the record proper and the exceptions fail to disclose prejudicial error. *State v. West*, 229 N.C. 416, 50 S.E.2d 3 (1948).

In *State v. Thompson*, 224 N.C. 661, 32 S.E.2d 24 (1944), although the assignments of error appearing on the record were not brought forward and grouped in accordance with the requirements of this rule, since defendants had been sentenced to death, the Supreme Court considered the appeal on its merits.

Assignment of Error Held Not to Comply with Rule.—See *Putnam v. Triangle Publications, Inc.*, 245 N.C. 432, 96 S.E.2d 445 (1957).

Assignments of error as to the admission of evidence did not comply with this rule. *Bridges v. Graham*, 246 N.C. 371, 98 S.E.2d 492 (1957).

An assignment of error read as follows: "That the court erred in the third, fifth, sixth, eighth, ninth and tenth findings of fact in the judgment, for that the evidence to support said findings of fact was not clear and unequivocal." Each finding of fact so challenged related to a different subject. This assignment did not comply with this rule. *Harrington v. Rice*, 245 N.C. 640, 97 S.E.2d 239 (1957).

An assignment of error, unsupported by exception, that the court erred in finding that the evidence was insufficient to sustain appellant's motion, is a broadside exception and ineffectual because of noncompliance with this rule and Rule 21. *Columbus County v. Thompson*, 249 N.C. 607, 107 S.E.2d 302 (1959).

An assignment of error that the court failed to declare and explain the law applicable to the facts in the case, without

pointing out what matters appellant contends were omitted, is a broadside exception. *Lewis v. Parker*, 268 N.C. 436, 150 S.E.2d 729 (1966).

An assignment of error that the court failed to declare the law arising on the evidence as required by § 1-180, is a broadside exception and ineffectual. *Chalmers v. Womack*, 269 N.C. 433, 152 S.E.2d 505 (1967).

Grouping of Exceptions Held Not to Comply with Rule.—See *Hines v. Frink*, 257 N.C. 723, 127 S.E.2d 509 (1962).

Exception Held Ineffectual.—An exception to the charge on the ground that it "did not give the contentions of the plaintiffs with equal dignity with those of defendant" as required by § 1-180 held ineffectual as a broadside exception in that it fails to point out any particular contention or series of contentions given or omitted by the court as the basis for the exception. *Poniros v. Nello L. Teer Co.*, 236 N.C. 144, 72 S.E.2d 9 (1952).

Appeal Dismissed for Failure to Follow Rule.—Where exceptions and assignments of error in a special municipal court are overruled upon appeal to the superior court, and are again relied on in an appeal to the Supreme Court, they must be sufficiently definite to enable the Supreme Court to understand what questions are sought to be presented without a voyage of discovery through the record, and otherwise the appeal will be dismissed on the appellee's motion. *Cecil v. Snow Lumber Co.*, 197 N.C. 81, 147 S.E. 735 (1929).

Assignments of error which only group the exceptions, as, "Group 1 includes the first assignment," etc., give no indication of the error complained of, and are far from being a compliance with the rule, and will be dismissed under this rule. *Merritt v. Dick*, 169 N.C. 244, 85 S.E. 2 (1915). See also *Smith v. Globe Home Furniture Mfg. Co.*, 151 N.C. 260, 65 S.E. 1009 (1909); *McDonald v. Kent*, 153 N.C. 555, 69 S.E. 626 (1910).

Where the exceptions and assignments of error are not grouped as required by this rule, the appeal may be dismissed. *Eno Inv. Co. v. Protective Chems. Laboratory, Inc.*, 233 N.C. 294, 63 S.E.2d 637 (1951).

A failure to comply with this rule by

express language warrants a dismissal. *State v. Broadway*, 256 N.C. 608, 124 S.E.2d 568 (1962).

Transcript Filed Too Late for Hearing.—Where transcript was filed too late for hearing at term on appeal, a motion to dismiss, on the ground that assignments of error were not grouped and numbered as required by the rule, could not be entertained until the following term. *McLean v. McDonald*, 175 N.C. 418, 95 S.E. 769 (1918).

Applied in *Hancock v. Wilson*, 211 N.C. 129, 189 S.E. 631 (1937); *State v. Moore*, 222 N.C. 356, 23 S.E.2d 31 (1942); *Suits v. Old Equity Life Ins. Co.*, 241 N.C. 483, 85 S.E.2d 602 (1955); *Rigsbee v. Perkins*, 242 N.C. 502, 87 S.E.2d 926 (1955); *Arcady Farms Milling Co. v. Laws*, 242 N.C. 505, 87 S.E.2d 925 (1955); *Davis v. Vaughn*, 243 N.C. 486, 91 S.E.2d 165 (1956); *Travis v. Johnston*, 244 N.C. 713, 95 S.E.2d 94 (1956); *E.L. Lowie & Co. v. Atkins*, 245 N.C. 98, 95 S.E.2d 271 (1956); *Harriet Cotton Mills v. Local Union No. 578*, 251 N.C. 218, 111 S.E.2d 457 (1959); *Benton v. C.G. Willis, Inc.*, 252 N.C. 166, 113 S.E.2d 288 (1960); *Daniel v. Butler Lumber Co.*, 254 N.C. 504, 119 S.E.2d 397 (1961); *Gibbs v. Gaimel*, 257 N.C. 650, 127 S.E.2d 271 (1962); *Benthall v. Washington Hog Market, Inc.*, 257 N.C. 748, 127 S.E.2d 507 (1962); *State v. Pearson*, 258 N.C. 188, 128 S.E.2d 251 (1962); *State v. Brown*, 263 N.C. 786, 140 S.E.2d 413 (1965); *Beacon Homes, Inc. v. Holt*, 266 N.C. 467, 146 S.E.2d 434 (1966); *State v. Sellers*, 266 N.C. 734, 147 S.E.2d 225 (1966); *Nicholson v. Dean*, 267 N.C. 375, 148 S.E.2d 247 (1966).

Cited in *Curlee v. Scales*, 223 N.C. 788, 28 S.E.2d 576 (1944); *State v. Scriven*, 232 N.C. 198, 59 S.E.2d 428 (1950); *State v. Summerlin*, 232 N.C. 333, 60 S.E.2d 322 (1950); *State v. Liles*, 232 N.C. 622, 61 S.E.2d 603 (1950); *State v. Gordon*, 241 N.C. 356, 85 S.E.2d 322 (1955); *State v. Bostic*, 242 N.C. 639, 89 S.E.2d 261 (1955); *Woody v. Pickelsimer*, 248 N.C. 599, 104 S.E.2d 273 (1958); *State v. Grundler*, 251 N.C. 177, 111 S.E.2d 1 (1959); *Tindal v. Mills*, 265 N.C. 716, 144 S.E.2d 902 (1965); *Gasque v. State*, 271 N.C. 323, 156 S.E.2d 740 (1967).

(4) Evidence to Be Stated in Narrative Form. The evidence in case on appeal shall be in narrative form, and not by question and answer, except that a question and answer, or a series of them, may be set out when the subject of a particular exception. When this rule is not complied with, and the case on appeal is settled by the judge, this Court will in its discretion hear the appeal, or remand for a settlement of the case to conform to this rule. If the case is settled by agreement

of counsel, or the statement of the appellant becomes the case on appeal, and the rule is not complied with, or the appeal is from a judgment of nonsuit, the appeal will be dismissed. In other cases the Court will in its discretion dismiss the appeal, or remand for a settlement of the case on appeal: Provided, however, that in appeals from appellate judgments of the superior court in cases originating in the district court it shall be permissible and optional with counsel to narrate the evidence or to include it in question and answer form in the case on appeal.

Cross Reference.—As to case on appeal, generally, see §§ 1-282, 1-283 and notes thereto.

The primary purpose of this rule is to save the time of the Supreme Court in reviewing the evidence and to reduce printing costs. *Keller v. Security Mills of Greensboro, Inc.*, 260 N.C. 571, 133 S.E.2d 222 (1963).

Rule Is Mandatory.—This rule is mandatory, and failure to comply limits the appeal to errors presented by the record proper, and in the absence of such error, the appeal will be dismissed. *Laughinghouse v. Farm Bureau Mut. Auto. Ins. Co.*, 239 N.C. 678, 80 S.E.2d 457 (1954); *State v. McNeill*, 239 N.C. 679, 80 S.E.2d 680 (1954); *Whiteside v. Ralston Purina Co.*, 242 N.C. 591, 89 S.E.2d 159 (1955); *State v. Griffin*, 246 N.C. 680, 100 S.E.2d 49 (1957); *State v. Womack*, 251 N.C. 342, 111 S.E.2d 332 (1959); *Standard Amusement Co. v. Tarkington*, 251 N.C. 461, 111 S.E.2d 538 (1959).

This rule is mandatory, and may not be waived by the parties. *Huie v. Templeton*, 246 N.C. 86, 97 S.E.2d 455 (1957); *State v. Griffin*, 246 N.C. 680, 100 S.E.2d 49 (1957); *State v. Best*, 265 N.C. 477, 144 S.E.2d 416 (1965).

When the evidence adduced at the trial is not contained in the record, the appeal must be dismissed in the absence of error appearing upon the face of the record. *State v. Prince*, 270 N.C. 769, 154 S.E.2d 897 (1967); *State v. Benfield*, 8 N.C. App. 103, 174 S.E.2d 57 (1970).

And May Be Enforced ex Mero Motu.—The requirement of this rule will be enforced ex mero motu. *Huie v. Templeton*, 246 N.C. 86, 97 S.E.2d 455 (1957).

Where the case on appeal as served by appellants became the case on appeal, and the transcript of evidence therein, other than pleadings offered, was mainly in question and answer form, and the appeal was from a judgment of nonsuit, the appeal was dismissed by the Court ex mero motu. *Huie v. Templeton*, 246 N.C. 86, 97 S.E.2d 455 (1957).

Cannot Be Waived.—The requirements of the rule of the Supreme Court, that the evidence must appear in the case on appeal in narrative form, cannot be waived by

the parties. *Bucken v. South & W. Ry.*, 157 N.C. 443, 73 S.E. 137 (1911); *First Nat'l Bank v. Fries*, 162 N.C. 516, 77 S.E. 678 (1913); *State v. McNeill*, 239 N.C. 679, 80 S.E.2d 680 (1954); *Standard Amusement Co. v. Tarkington*, 251 N.C. 461, 111 S.E.2d 538 (1959).

Effect of Failure to Comply.—Where the appellant has failed to make a concise statement of the evidence according to the rules of practice, but gives the entire evidence in the form of questions to and answers of witnesses, taken from the stenographer's notes, the appeal will be dismissed and the judgment affirmed upon motion of the appellee. *Casey v. East Carolina Ry.*, 198 N.C. 432, 152 S.E. 38 (1930); *Rhoades v. City of Asheville*, 220 N.C. 443, 17 S.E.2d 500 (1941).

Although case on appeal was not prepared in accordance with this rule the appeal was allowed as a dismissal would have been a denial of justice. *Messick v. City of Hickory*, 211 N.C. 531, 191 S.E. 43 (1937).

An appeal will not be dismissed under this rule, unless the narration of the evidence is fatally defective. *Keller v. Security Mills of Greensboro, Inc.*, 260 N.C. 571, 133 S.E.2d 222 (1963).

Where the evidence in the case on appeal is set out entirely in questions and answers instead of in narrative form as required by this rule, the Supreme Court considers only errors presented by the record proper. *Anson Bank & Trust Co. v. Henry*, 267 N.C. 253, 148 S.E.2d 7 (1966).

Objection to Noncompliance Presented by Counter-Case or Exceptions to Case.—Objection that appellant, instead of reducing the testimony to narrative form as required by this rule, merely gave conclusions as to the meaning of the testimony should ordinarily be presented by counter-case or exceptions to the case on appeal. *Keller v. Security Mills of Greensboro, Inc.*, 260 N.C. 571, 133 S.E.2d 222 (1963).

Stenographer's Notes Insufficient.—When the appellant has set out in the case on appeal the transcribed stenographer's notes of the trial, he fails to prepare a concise statement of the case as required by this rule, and his appeal will be dismissed, when upon examination no error is found in the record proper. *Bucken v. South & W. Ry.*, 157 N.C. 443, 73 S.E. 137 (1911);

Skipper v. Kingsdale Lumber Co., 158 N.C. 322, 74 S.E. 342 (1912).

Appeal in Forma Pauperis.—That the action is in forma pauperis, does not excuse the appellant in sending up the transcribed stenographer's notes in a voluminous record. *Skipper v. Kingsdale Lumber Co.*, 158 N.C. 322, 74 S.E. 342 (1912).

(5) **Unnecessary Portions of Transcript—How Taxed.** The cost of copying and printing unnecessary and irrelevant testimony, or any other matter not needed to explain the exceptions or errors assigned, and not constituting a part of the record proper, shall in all cases be charged to the appellant, unless it appears that they were sent up at the instance of the appellee, in which case the cost shall be taxed against him.

Cross Reference.—See note to Rule 26.

(6) **Transcripts in Pauper Appeals.** See Rule 22.

(7) **Maps.** Nine copies of every map or diagram which is a part of the transcript of appeal, and which is applicable to the merits of the appeal, shall be filed with the clerk of this Court before such appeal is called for argument.

Filing Copies of Plat.—Where a plat is referred to in the pleadings and evidence, and is necessary to the understanding of an appeal, the same number of copies of the plat must be filed as is required of the printed record and briefs, or the judgment below will be affirmed or appeal dismissed. *Stephens v. McDonald*, 132 N.C. 135, 43 S.E. 592 (1903).

This is also true of an exhibit made part of the case on appeal. *Fleming v. McPhail*, 121 N.C. 183, 28 S.E. 258 (1897); *Hicks v. Royal*, 122 N.C. 405, 29 S.E. 413 (1898).

But where the map or plat is irrelevant its exclusion will not be held error. *Fulwood v. Fulwood*, 161 N.C. 601, 77 S.E. 763 (1913).

(8) **Appeal Bond.** See Rule 6 (1).

Cross References.—As to appeal bond generally, see § 1-285 et seq. As to costs on appeal generally, see § 6-33 et seq.

(9) **Prosecution Bond.** The prosecution bond given in every case shall be sent up with the transcript of the record. Such bond shall be justified and the justification shall name the county wherein the surety resides.

(10) **Insufficient transcript.** If a transcript has not been properly arranged, as required by subsection (1) of this rule, the appeal shall be dismissed or referred to the clerk to be properly arranged, for which an allowance of \$5 shall be made to him. If the appeal is not dismissed, and is so referred to the clerk, it shall be placed for hearing at the end of the district, or the end of the docket, or continued as the Court may deem proper.

Appeal Properly Dismissed Where "Judgment of Superior Court" Is Assigned as Error.—Where, on appeal from judgment of the general county court to the superior court on matters of law, the superior court overrules each of the exceptions relied upon by appellant, upon further appeal to the Supreme Court the appellant should

bring forward each ruling of the superior court on the exceptions deemed erroneous, and properly group them and assign same as error, and where appellant merely assigns as error "the judgment of the superior court," the appeal will be dismissed or the judgment affirmed. *Harrell v. White*, 208 N.C. 409, 181 S.E. 268 (1935).

20. Pleadings

(1) **When Deemed Frivolous.** Memoranda of pleadings will not be received or recognized in the Supreme Court as pleading, even by consent of counsel, but the same will be treated as frivolous and impertinent.

The absence of the complaint from the record makes it necessary to dismiss the appeal. *Williams v. Asheville Contracting Co.*, 259 N.C. 232, 130 S.E.2d 340 (1963).

Transcript Failing to Meet Requirements of Rule.—See *Smook v. Newton*, 234 N.C. 451, 67 S.E.2d 462 (1951).

Applied in *Ericson v. Ericson*, 226 N.C. 474, 38 S.E.2d 517 (1946).

Quoted in *Pace v. Pace*, 244 N.C. 698, 94 S.E.2d 819 (1956).

Stated in *Thrush v. Thrush*, 245 N.C. 63, 94 S.E.2d 897 (1956).

Cited in *Washington County v. Norfolk S. Land Co.*, 222 N.C. 637, 24 S.E.2d 338 (1943).

(2) When Containing More than One Cause of Action. Every pleading containing two or more causes of action shall, in each, set out all the facts upon which it rests, and shall not, by reference to others, incorporate in itself any of the allegations in them, except that exhibits, by marks or numbers, may be referred to without reciting their contents, when attached thereto.

Causes of Action Must Be Separately Stated.—Where plaintiff brings suit on two causes of action, each must be separately stated. *Bannister & Sons v. Williams*, 261 N.C. 586, 135 S.E.2d 572 (1964).

And So Must Cross Action and Counterclaim.—Where facts were alleged in a series of paragraphs, without any satisfactory attempt to distinguish between those relating to cross action and those relating to the counterclaim, a demurrer was sustained. *Perfecting Serv. Co. v. Product Dev. & Sales Co.*, 261 N.C. 660, 136 S.E.2d 56 (1964).

A defective statement of a good cause of action incorporated in another cause of action violates this rule. *Mills v. Carolina Cemetery Park Corp.*, 242 N.C. 20, 86 S.E.2d 893 (1955).

Referring to Prior Paragraphs by Number Insufficient.—A party may not bring forward allegations contained in prior paragraphs of the pleading by referring to such paragraphs by number and stating that pleader repleads them. *Wrenn v. Graham*, 236 N.C. 719, 74 S.E.2d 232 (1952).

An attempt to repeat in the statement of the second cause of action what is alleged in the first cause of action merely by referring to the appropriate paragraphs of the first cause by number is violative of

this rule. *Guy v. Baer*, 234 N.C. 276, 67 S.E.2d 47 (1951).

Effect of Noncompliance.—Demurrer to answer will not be sustained if sufficient facts can be gathered from pleadings to entitle defendant to some relief, notwithstanding answer fails to state separately cause or causes relied on for affirmative relief and the matters relied on as defenses, as required by this rule. *Pearce v. Pearce*, 226 N.C. 307, 37 S.E.2d 904 (1946).

Action by Assignees of Claims for Unpaid Wages.—Claims for unpaid wages are choses in action which can be assigned, and a single assignee or several assignees holding jointly can maintain one action to recover the several sums assigned to them. In such an action, this rule would apply and each claim should be set out as a separate and distinct cause of action. *Morton v. Thornton*, 259 N.C. 697, 131 S.E.2d 378 (1963).

Applied in *Crouch v. Lowther Trucking Co.*, 262 N.C. 85, 136 S.E.2d 246 (1964); *Kearns v. Primm*, 263 N.C. 423, 139 S.E.2d 697 (1965).

Stated in *Tart v. Byrne*, 243 N.C. 409, 90 S.E.2d 692 (1956).

Cited in *King v. Coley*, 229 N.C. 258, 49 S.E.2d 648 (1948); *Monroe v. Dietenhoffer*, 264 N.C. 538, 142 S.E.2d 135 (1965).

(3) When Scandalous. Pleadings containing scandalous or impertinent matter will, in a plain case, be ordered by the Court to be stricken from the record, or reformed; and for this purpose the Court may refer it to the clerk, or some member of the bar, to examine and report the character of the same.

Editor's Note.—For article on motion to strike pleadings, see 29 N.C.L. Rev. 3.

Impertinent Matter Is Stricken.—Where "impertinent" matter is introduced into the pleadings, it is, according to the course of the Supreme Court, to be stricken out at the expense of the party introducing it. *Powell v. Cobb*, 56 N.C. 1 (1856).

No matter is impertinent, however scandalous it may be, or however much it may tend to degrade, provided it bears upon the point about which the parties are at issue. *Powell v. Cobb*, 56 N.C. 1 (1856).

(4) Amendments. The Court may amend any process, pleading, or proceeding, either in form or substance, for the purpose of furthering justice, on such terms as shall be deemed just, at any time before final judgment, or may make proper

parties to any case, where the Court may deem it necessary and proper for the purpose of justice, and on such terms as the Court may prescribe.

When Party May Amend Pleadings. — The Supreme Court on appeal may allow a party to amend so as to make his pleadings conform to the stipulations of the parties and the theory upon which the case was tried in the lower court, but the Supreme Court will not allow an amendment which would not make the record conform to the facts developed on the trial but would present matter relating to a theory different from that upon which the trial court proceeded. *Kayler v. Gallimore*, 269 N.C. 405, 152 S.E.2d 518 (1967).

The Supreme Court may in its discretion allow plaintiff to amend his complaint so that the pleadings conform to the proof

where it appears that the defendant was not taken by surprise by such proof and that he failed to object to the admission thereof. *Anderson v. Carter*, 272 N.C. 426, 158 S.E.2d 607 (1968).

The Supreme Court will not anticipate questions of constitutional law in advance of the necessity of deciding them, nor will it give advisory opinions on such questions, and where the record in a case on appeal is so incomplete that it may not be determined that the constitutionality of a statute is squarely presented, the questions will not be decided. *J.O. Plott Co. v. H.K. Ferguson Constr. Co.*, 198 N.C. 782, 153 S.E. 396 (1930).

21. Exceptions

Every appellant shall set out in his statement of case served on appeal his exceptions to the proceedings, ruling, or judgment of the court, briefly and clearly stated and numbered. When no case settled is necessary, then, within ten days next after the end of the term at which the judgment is rendered from which an appeal shall be taken, or, in case of a ruling of the court at chambers and not in term-time, within ten days after notice thereof, appellant shall file the said exceptions in the office of the clerk of the court below. No exceptions not thus set out, or filed and made a part of the case or record, shall be considered by this Court, other than exceptions to the jurisdiction, or because the complaint does not state a cause of action, or motions in arrest for the insufficiency of an indictment. When testimony is admitted, not as substantive evidence, but in corroboration or contradiction, and that fact is stated by the court when it is admitted, it will not be ground for exception that the judge fails in his charge to again instruct the jury specially upon the nature of such evidence, unless his attention is called to the matter by a prayer for instruction; nor will it be ground of exception that evidence competent for some purposes but not for all, is admitted generally, unless the appellant asks, at the time of admission, that its purpose shall be restricted.

I. Exceptions.

II. Corroborative and Contradictory Evidence.

I. EXCEPTIONS.

Cross References.—As to exceptions generally, see § 1-186 and note thereto. See analysis line III of note to § 1-282. See also note to Rule 19 (3).

This rule and Rule 19 (3) apply to all appeals, whether they come to the Supreme Court by writ or in regular order. *Williams v. Williams*, 261 N.C. 48, 134 S.E.2d 227 (1964).

Rule Mandatory. — This rule and Rule 19 (3) are mandatory. *Pamlico County v. Davis*, 249 N.C. 648, 107 S.E.2d 306 (1959); *Darden v. Bone*, 254 N.C. 599, 119 S.E.2d 634 (1961); *Kleinfeldt v. Shoney's of Charlotte, Inc.*, 257 N.C. 791, 127 S.E.2d 573 (1962).

The rules of practice of the Supreme

Court are mandatory. *Jim Walter Corp. v. Gilliam*, 260 N.C. 211, 132 S.E.2d 313 (1963).

Rules of practice in the Supreme Court are mandatory and will be enforced. *Lewis v. Parker*, 268 N.C. 436, 150 S.E.2d 729 (1966); *In re Will of Adams*, 268 N.C. 565, 151 S.E.2d 59 (1966).

This rule and Rule 19 are mandatory and will be enforced. *State v. Benton*, 276 N.C. 641, 174 S.E.2d 793 (1970).

Appeal Dismissed for Failure to Follow Rule.—The Court will dismiss the appellant's case when he fails to assign error as required by this rule. *Hobbs v. Cashwell*, 158 N.C. 597, 74 S.E. 23 (1912); *Maddillon Engine & Thresher Co. v. Thomas*, 170 N.C. 680, 87 S.E. 327 (1915); *In re Bailey*, 180 N.C. 30, 103 S.E. 896 (1920).

The appellee's motion to dismiss the appeal because, (1) the exceptions are not

"briefly and clearly stated and numbered," (2) the exceptions relied upon are not grouped and numbered immediately after the end of the case on appeal, (3) the index is not placed at the front of the record, will be allowed. *Davis v. Wall*, 142 N.C. 450, 55 S.E. 350 (1906). See also *Jones v. Atlantic Coast Line R.R.*, 153 N.C. 419, 69 S.E. 427 (1910).

Rule Cannot Be Waived.—The rule requiring the assignment of error in the record on appeal is for the benefit of the Court, and counsel cannot waive it. *Southern Spruce Co. v. Hunnicutt*, 166 N.C. 202, 81 S.E. 1079 (1914); *Parrott v. Hardesty*, 169 N.C. 667, 86 S.E. 582 (1915).

An assignment of error alone will not suffice. Only an assignment of error bottomed on an exception duly entered in the record will serve to present a question of law for the Supreme Court to decide. *State v. Williams*, 235 N.C. 429, 70 S.E.2d 1 (1952); *Hines v. Frink*, 257 N.C. 723, 127 S.E.2d 509 (1962).

An assignment of error must be based upon an exception duly taken, in apt time, during the trial and preserved as required by this rule and Rule 19 (3). *State v. Strickland*, 254 N.C. 658, 119 S.E.2d 781 (1961).

The Court will not consider assignments not based on specific exceptions and which do not comply with its rules. *Darden v. Bone*, 254 N.C. 599, 119 S.E.2d 634 (1961).

An assignment of error not supported by an exception is ineffectual. *Vance v. Hampton*, 256 N.C. 557, 124 S.E.2d 527 (1962).

Assignments of error unsupported by an exception duly taken and preserved will not be considered on appeal. *Hicks v. Russell*, 256 N.C. 34, 123 S.E.2d 214 (1961).

An assignment of error is worthless unless it is based upon an exception duly taken in apt time during the trial and preserved as required by this rule and Rule 19 (3). *Knutton v. Cofield*, 273 N.C. 355, 160 S.E.2d 29 (1968).

Appellant Must Point Out Error by Exception.—It is the duty of an appellant who asserts prejudicial error to point out the asserted error by exception. *State v. Rorie*, 258 N.C. 162, 128 S.E.2d 229 (1962).

The exceptions which are bona fide shall be stated clearly and intelligibly by the assignment of errors and not by referring to the record, and therewith shall be set out so much of the evidence or of the charge or other matter or circumstance as shall be necessary to present clearly the matter to be debated. *State v. Kirby*, 276 N.C. 123, 171 S.E.2d 416 (1970).

Assignments of error not supported by exceptions present no question of law for the Supreme Court to decide. *Corns v. Nickelston*, 257 N.C. 277, 125 S.E.2d 588 (1962).

An assignment of error relating to restrictions placed on cross-examination does not comply with this rule and Rule 19 (3) if it does not contain any question put to any witness on cross-examination. *State v. Kirby*, 276 N.C. 123, 171 S.E.2d 416 (1970).

Assignment of Error Must Be Clearly Stated.—Assignments of error must be clearly and intelligently stated so that the Court will not have to look at exceptions therein referred to in order that they may be understood; for otherwise they will not be considered on appeal. *Myrose v. Swain*, 172 N.C. 223, 90 S.E. 118 (1916).

Assignments of error should be sufficient in form to present the errors relied on without the necessity of going beyond the assignments themselves to learn what the questions are. *State v. Burton*, 256 N.C. 464, 124 S.E.2d 108 (1962); *Balint v. Grayson*, 256 N.C. 490, 124 S.E.2d 364 (1962); *Jenks v. Morrison*, 258 N.C. 96, 127 S.E.2d 895 (1962).

What the Supreme Court requires is that exceptions which are presented to the Court for decision shall be stated clearly and intelligibly by the assignment of error, and not be referring to the record, and therewith there shall be set out so much of the evidence or other matter of circumstance as shall be necessary to present clearly the matter to be debated. In this way the scope of inquiry is narrowed to the identical points which the appellant thinks are material and essential, and the Court is not sent scurrying through the entire record to find the matters complained of. *Darden v. Bone*, 254 N.C. 599, 119 S.E.2d 634 (1961).

Assignments of error which are insufficient to present the errors relied upon without the necessity of going beyond the assignments themselves to learn what the questions are do not comply with this rule. *Jones v. Saunders*, 257 N.C. 118, 125 S.E.2d 350 (1962).

An assignment of error does not comply with this rule, where it does not disclose the questions sought to be presented without the necessity of going beyond the assignment of error itself. *State v. Wilson*, 264 N.C. 373, 141 S.E.2d 801 (1965); *State v. Coleman*, 270 N.C. 357, 154 S.E.2d 485 (1967).

Assignments of error to a charge which do not set forth the part of the charge challenged do not comply with the rules of

practice in the Supreme Court. *State v. Dixon*, 256 N.C. 698, 124 S.E.2d 821 (1962).

When an exception relates to the charge, that portion to which the exception is taken must be set out in the particular assignment of error. A mere reference to the exception number and the page number of the record where the exception appears will not present the alleged error for review. *Samuel v. Evans*, 264 N.C. 393, 141 S.E.2d 627 (1965).

Rule 19 (3) and this rule require an assignment of error to state clearly and intelligently what question is intended to be presented without the necessity of the Court going beyond the assignment of error itself "on a voyage of discovery" through the record to find the asserted error and the precise question involved. *Kleinfeldt v. Shoney's of Charlotte, Inc.*, 257 N.C. 791, 127 S.E.2d 573 (1962).

Rule 19 and this rule require that asserted error must be based on an appropriate exception, and must be properly assigned. *Lewis v. Parker*, 268 N.C. 436, 150 S.E.2d 729 (1966); *State v. Benton*, 276 N.C. 641, 174 S.E.2d 793 (1970).

Rule 19 and this rule require an assignment of error to show specifically what question is intended to be presented for consideration without the necessity of going beyond the assignment of error itself. A mere reference in the assignment of error to the record page where the asserted error may be discovered is not sufficient. *Lewis v. Parker*, 268 N.C. 436, 150 S.E.2d 729 (1966); *In re Will of Adams*, 268 N.C. 565, 151 S.E.2d 59 (1966); *State v. Benton*, 276 N.C. 641, 174 S.E.2d 793 (1970).

The error relied upon should be definitely and clearly presented, and the Court not compelled to go beyond the assignment of error itself to learn what the question is. *State v. Mohrmann*, 265 N.C. 594, 144 S.E.2d 645 (1965).

An assignment of error must disclose the question sought to be presented without the necessity of going beyond the assignment itself. *Williams v. Boulterice*, 269 N.C. 499, 153 S.E.2d 95 (1967).

An exception must point out some specific part of the charge as erroneous. *Jenkins v. Gaines*, 272 N.C. 81, 157 S.E.2d 669 (1967).

The assignment should clearly present and specifically point out the alleged error relied upon without the necessity of going beyond the assignment itself to ascertain the question to be debated. *State v. Kirby*, 276 N.C. 123, 171 S.E.2d 416 (1970).

The assignment must be so specific that the Court is given some real aid and a voyage of discovery through an often voluminous record not rendered necessary. *State v. Kirby*, 276 N.C. 123, 171 S.E.2d 416 (1970).

Assignments of error to the charge should quote the portion of the charge to which appellant objects, and assignments based on failure to charge should set out appellant's contention as to what the Court should have charged. *State v. Kirby*, 276 N.C. 123, 171 S.E.2d 416 (1970); *State v. Baldwin*, 276 N.C. 690, 174 S.E.2d 526 (1970).

When an exception relates to the charge, that portion to which the exception is taken must be set out in the particular assignment of error. A mere reference to the exception number and the page number of the record where the exception appears will not present the alleged error for review. *State v. Kirby*, 276 N.C. 123, 171 S.E.2d 416 (1970).

Duty to Prepare Assignment of Error.—The preparation of the assignment of error is the work of the attorney for the appellant, and is not a part of the case on appeal, and its office is to group the exceptions noted in the case on appeal; and, if there is an assignment of error not supported by an exception, it will be disregarded. *Worley v. Laurel River Logging Co.*, 157 N.C. 490, 73 S.E. 107 (1911); *Allred v. Kirkman*, 160 N.C. 392, 76 S.E. 244 (1912); *McLeod v. Gooch*, 162 N.C. 122, 78 S.E. 4 (1913).

An assignment of error must present a single question of law for consideration by the Court. *Hines v. Frink*, 257 N.C. 723, 127 S.E.2d 509 (1962); *State v. Wilson*, 264 N.C. 373, 141 S.E.2d 801 (1965).

An assignment which attempts to raise several different questions is broadside. *Hines v. Frink*, 257 N.C. 723, 127 S.E.2d 509 (1962).

Broadside Exception.—An assignment of error, unsupported by exception, that the court erred in finding that the evidence was insufficient to sustain appellant's motion is a broadside exception and ineffectual because of noncompliance with Rule 19 (3) and this rule. *Columbus County v. Thompson*, 249 N.C. 607, 107 S.E.2d 302 (1959).

A broadside exception may not be aided by the assignment of error. *Hicks v. Russell*, 256 N.C. 34, 123 S.E.2d 214 (1961).

A broadside exception presents nothing for consideration by the Supreme Court but the question whether the facts found

support the judgment. *Hicks v. Russell*, 256 N.C. 34, 123 S.E.2d 214 (1961).

A broadside exception to the findings of fact does not bring up for review the findings of fact or the evidence on which the findings are based. *State v. Burrell*, 256 N.C. 288, 123 S.E.2d 795, cert. denied 370 U.S. 961, 82 S. Ct. 1621, 8 L. Ed. 2d 827 (1962).

An exception must be made to a particular finding of fact and point out specifically the alleged error, and an exception to the findings of fact and the conclusions of law based thereon, is a broadside exception and ineffectual. *State v. Burrell*, 256 N.C. 288, 123 S.E.2d 795, cert. denied 370 U.S. 961, 82 S. Ct. 1621, 8 L. Ed. 2d 827 (1962).

A single exception to "the findings of fact and conclusions of law based thereon" has been consistently held by the Supreme Court to be "a broadside exception and ineffectual." *Hicks v. Russell*, 256 N.C. 34, 123 S.E.2d 214 (1961).

Exceptions which do not specify wherein it is claimed the Court erred in instructing the jury are broadside and wholly ineffectual to support the assignments of error. *Corns v. Nickelston*, 257 N.C. 277, 125 S.E.2d 588 (1962).

An assignment of error that the Court failed to declare and explain the law applicable to the facts in the case, without pointing out what matters appellant contends were omitted, is a broadside exception. *Lewis v. Parker*, 268 N.C. 436, 150 S.E.2d 729 (1966).

An assignment of error based on an exception "to the entire charge of the Court" is broadside and is ineffectual to bring up any part of the charge for review. *State v. Baldwin*, 276 N.C. 690, 174 S.E.2d 526 (1970).

An assignment of error that "the charge to the jury was not fair and impartial and was prejudicial to the defendant," is broadside and ineffectual. *State v. Baldwin*, 276 N.C. 690, 174 S.E.2d 526 (1970).

Broadside Assignment of Error to Findings of Fact Improper.—Plaintiff's assignment of error as to the judge's findings of fact was as follows: "1. For that the judge of the superior court made certain findings of fact, which findings of fact are not supported by the evidence and which findings are contrary to the evidence." This was a broadside assignment of error, which failed to point out or designate in the assignment of error the particular rulings to which exceptions were taken, so that in the assignment of error the Supreme Court could see the alleged error made by the judge.

Putnam v. Triangle Publications, Inc., 245 N.C. 432, 96 S.E.2d 445 (1957).

General Exception.—Where the plaintiff filed a large number of exceptions to the referee's report and the judge confirms or modifies certain portions of the report and sets aside others, an exception, "The plaintiff excepts to such rulings, adverse to it and appeals," is too general to be considered. *Commissioners v. Erwin*, 140 N.C. 193, 52 S.E. 785 (1905).

Where there is a single assignment of error to several rulings of the trial court, and one of them is correct, the assignment must fail. *Buie v. Kennedy*, 164 N.C. 290, 80 S.E. 445 (1913).

An exception to a portion of a charge embracing a number of propositions is insufficient if any of the propositions are correct. *Clifton v. Turner*, 257 N.C. 92, 125 S.E.2d 339 (1962); *Jenkins v. Gaines*, 272 N.C. 81, 157 S.E.2d 669 (1967).

The questions arising on an appeal are those defined by appropriate exceptions taken by the appellant in the superior court. *Sprinkle v. City of Reidsville*, 235 N.C. 140, 29 S.E.2d 179 (1952).

The failure to except leaves nothing to review. *State v. Rorie*, 258 N.C. 162, 128 S.E.2d 229 (1962).

Scope of Review Where Assignments of Error to Findings of Fact Are Insufficient.

—Where the assignments of error are insufficient to present the findings of fact for review, the appeal presents the questions whether the findings support the court's inferences and conclusions of law and judgment, and whether error appears on the face of the record. *Putnam v. Triangle Publications, Inc.*, 245 N.C. 432, 96 S.E.2d 445 (1957).

When no exception has been taken to a finding of fact, such finding is presumed to be supported by competent evidence and is binding on appeal. *Cratch v. Taylor*, 256 N.C. 462, 124 S.E.2d 124 (1962); *Schloss v. Jamison*, 258 N.C. 271, 128 S.E.2d 590 (1962).

Appeal Is to Judgment if No Exceptions Preserved.—In the absence of any exceptions, or when exceptions have not been preserved in accordance with the requirements of the rules, the appeal will be taken as an exception to the judgment. *Cratch v. Taylor*, 256 N.C. 462, 124 S.E.2d 124 (1962).

An appeal to the Supreme Court is itself an exception to the judgment or to any other matter of law appearing on the face of the record. *Balint v. Grayson*, 256 N.C. 490, 124 S.E.2d 364 (1962).

The only question raised by an exception to the judgment is whether error of law appears upon the face of the record. *Vance v. Hampton*, 256 N.C. 557, 124 S.E.2d 527 (1962).

Exceptions Must Be Set Out and Numbered.— Exceptions relied upon in the statement of the case must be set out and numbered. *Barnette v. Woody*, 242 N.C. 424, 88 S.E.2d 223 (1955).

The appellant must classify his exceptions, putting in a separate group all exceptions which relate to each particular question. *State v. Rorie*, 258 N.C. 162, 128 S.E.2d 229 (1962).

Where appellant's exceptions are not grouped as required by Rule 19 (3) and this rule, they may not be considered. *Balint v. Grayson*, 256 N.C. 490, 124 S.E.2d 364 (1962).

The failure to group requires a dismissal of the appeal. *State v. Rorie*, 258 N.C. 162, 128 S.E.2d 229 (1962).

It is entirely proper to group more than one exception under one assignment, when all the exceptions relate to a single question of law. *State v. Wilson*, 264 N.C. 373, 141 S.E.2d 801 (1965).

But if Exceptions Relate to Distinct Parts of Charge and Any Part Is Correct, Assignment Fails.—Where there is a single assignment of error based upon several exceptions to several distinct parts of the judge's charge, and one of the parts excepted to is correct, the assignment must fail. *State v. Wilson*, 264 N.C. 373, 141 S.E.2d 801 (1965).

Where the exceptions appear in the record only under the assignments of error, they are ineffectual, since the rules require that assignments of error be based upon exceptions previously noted, and the rules are mandatory and will be enforced *ex mero motu*. *Bulman v. Southern Baptist Convention*, 248 N.C. 392, 103 S.E.2d 487 (1958).

Assignments of error purporting to be supported by exceptions which appear nowhere in the record except in the purported assignments of error are ineffective and will not be considered on appeal. *Cratch v. Taylor*, 256 N.C. 462, 124 S.E.2d 124 (1962); *Vance v. Hampton*, 256 N.C. 557, 124 S.E.2d 527 (1962).

Reference by Number Insufficient.—This rule must be complied with to have the appeal considered by the Court; and where the assignments of error each simply refers to the exception of record by number, without giving the purport or text thereof, it is insufficient, and the judgment of the trial court will be affirmed. *Porter v.*

American Cigar Box Lumber Co., 164 N.C. 396, 80 S.E. 443 (1913).

A statement purporting to be assignments of error appearing in the record just after the statement of the case on appeal, setting forth in general terms that the appellant excepted to the rulings of the court, as appeared in certain numbered exceptions of record taken on trial, such exceptions themselves not being sufficiently stated, in excluding evidence, and "to a judgment of nonsuit as noted in the forty-seventh exception," is not definite enough for the Court to consider on appeal or to be referred to the clerk to be put in the prescribed shape therefor, and the appeal should be dismissed. *Thompson v. Seaboard Air Line R.R.*, 147 N.C. 412, 61 S.E. 286 (1908).

Reference to Page.— Where the assignments of error are not comprehensive enough to give a clear idea to the Court of the matters to be debated without examining the record, they will not be considered, as, "to the question and answer in the admission of the evidence" of a certain witness, "as contained in the exception 1 on page — of the record," and the giving of proper page will not cure its insufficiency. *Rogers v. Jones*, 172 N.C. 156, 90 S.E. 117 (1916).

A mere reference in the assignment of error to the page of the record where the asserted error may be discovered is not a compliance with this rule. *Zopf v. City of Wilmington*, 273 N.C. 430, 160 S.E.2d 325 (1968).

A mere reference in the assignment of error to the record page where the asserted error may be discovered fails completely to comply with Rules 19 (3) and 21. *State v. Kirby*, 276 N.C. 123, 171 S.E.2d 416 (1970).

Exception Not Considered.—The failure of the court to restrict the admission of testimony competent for the purpose of corroboration is not error where defendant neither objects to the admission of the testimony nor requests that its admission be restricted. *State v. Perry*, 226 N.C. 530, 39 S.E.2d 460 (1946); *Hatcher v. Clayton*, 242 N.C. 450, 88 S.E.2d 104 (1955).

An exception which is not assigned as error is deemed abandoned. *Balint v. Grayson*, 256 N.C. 490, 124 S.E.2d 364 (1962).

Assignments Not Based on Exceptions Considered in Capital Case.—Assignments of error should be based upon exceptions briefly and clearly stated and numbered in the record, but in a capital case, wherein the life of defendant is at stake, assign-

ments of error not so based nevertheless will be considered. *State v. Herring*, 226 N.C. 213, 37 S.E.2d 319 (1946).

Exceptions to Evidence.—The assignments of error on questions of evidence should set out the testimony so that their relevancy can be seen; and on the rulings of the court or some other matters occurring at the trial, the ruling itself or the attendant facts and circumstances should be so stated that their bearing on the controversy can be perceived to some extent in reading the assignments themselves. *Thompson v. Seaboard Air Line R.R.*, 147 N.C. 412, 61 S.E. 286 (1908); *Carter v. Reaves*, 167 N.C. 131, 83 S.E. 248 (1914).

The admission of evidence generally and without qualification will not be held erroneous, even though the evidence is competent only for the purpose of corroboration, when at the time of its admission defendant does not request that its purpose be restricted. *State v. Johnson*, 218 N.C. 604, 12 S.E.2d 278 (1940).

A general objection to evidence cannot be sustained if the evidence is competent for any purpose. *State v. Casper*, 256 N.C. 99, 122 S.E.2d 805 (1961).

When evidence competent for one purpose only and not for another is offered, it is incumbent upon the objecting party to request the court to restrict the consideration of the jury to that aspect of the evidence which is competent. *State v. Williams*, 272 N.C. 273, 158 S.E.2d 85 (1967); *State v. Goodson*, 273 N.C. 128, 159 S.E.2d 310 (1968).

Where the record fails to show what the witness would have testified had he been permitted to answer questions objected to, the exclusion of such testimony is not shown to be prejudicial. This rule applies as well to questions asked on cross-examination. *State v. Kirby*, 276 N.C. 123, 171 S.E.2d 416 (1970).

Agreement of Counsel.—Where the record shows that the solicitor agreed that the statement of case on appeal, containing an exception to his argument to the jury and an assignment of error based thereon, should constitute the case on appeal, this is sufficient as an exceptive assignment of error even though defendant made no objection and took no exception at the time. *State v. Hawley*, 229 N.C. 167, 48 S.E.2d 35 (1948).

Exceptions to Unanswered Questions.—Where exception is taken to the judge's exclusion of evidence upon the trial, it is upon appellant to show error, and when the exception is taken to unanswered questions, the substance of the answers must

be made to appear on appeal, so that the Supreme Court may pass upon its competency. *Wallace v. Barlow*, 165 N.C. 676, 81 S.E. 924 (1914); *Hamlet Ice Co. v. J.A. Jones Constr. Co.*, 194 N.C. 407, 139 S.E. 771 (1927).

An exception to the signing of an order granting a temporary injunction presents the questions whether the facts found are sufficient to support the conclusions of law and the order granting a temporary injunction entered pursuant thereto, and whether there is error of law appearing on the face of the record proper. *Schloss v. Jamison*, 258 N.C. 271, 128 S.E.2d 590 (1962).

Where the defendant did not assign the failure to allow his motion of nonsuit as error, on appeal the Supreme Court could not consider any of the questions which were raised by the motion for nonsuit. *State v. Overman*, 257 N.C. 464, 125 S.E.2d 920 (1962).

An exception to the signing of the judgment presents nothing for review except whether or not the court's conclusion of law is supported by the finding or findings of fact; such exception does not challenge the correctness of any findings of fact. *Cratch v. Taylor*, 256 N.C. 462, 124 S.E.2d 124 (1962).

Defendant desiring evidence to be restricted to particular purpose should make request to that effect. *State v. Hendricks*, 207 N.C. 873, 178 S.E. 557 (1935).

Exception to Issues Submitted.—Where a cause was tried under one issue, without exception taken, the assignment of error that other issues should have been submitted is not in compliance with the rules of court regulating appeals. *McNairy v. Norfolk & W.R.R.*, 172 N.C. 505, 90 S.E. 497 (1916).

Exception to Directed Verdict.—It is not required that an exception to the direction of a verdict by the court upon the evidence should conform to the particulars of this rule and Rules 19 and 28, for it is analogous to instances of nonsuit, which require that the court examine into the pertinent evidence in the record. *Wynn v. Grant*, 166 N.C. 39, 81 S.E. 949 (1914).

Questions Discussed in Brief Only.—A question discussed in the brief but not presented by any exception or assignment of error cannot be considered. *Coon v. Southern Ry.*, 171 N.C. 759, 88 S.E. 510 (1916); *Needham v. Southern Ry.*, 171 N.C. 765, 88 S.E. 511 (1916).

When Complaint Does Not State Cause of Action.—A defendant, without filing exception on appeal from an adverse judg-

ment, may move to dismiss the action on the ground that the complaint does not state a cause of action. *Lloyd v. North Carolina R.R.*, 151 N.C. 536, 66 S.E. 604 (1909).

This is not true of an objection for misjoinder of cause of action. *Wright v. Kinney*, 123 N.C. 618, 31 S.E. 874 (1898).

When it is claimed that findings of fact made by the trial judge are not supported by the evidence, the exceptions and assignments of error in relation thereto must specifically and distinctly point out the alleged errors. *Putnam v. Triangle Publications, Inc.*, 245 N.C. 432, 96 S.E.2d 445 (1957); *Burnsville v. Boone*, 231 N.C. 577, 58 S.E.2d 351 (1950).

Insufficiency of Indictment.—A motion in arrest of judgment for insufficiency of the indictment may be made in the Supreme Court on appeal, and it is not necessary that the question be presented by exception taken in the trial court. *State v. Jones*, 218 N.C. 734, 12 S.E.2d 292 (1940).

A motion in arrest of judgment for insufficiency of an indictment or warrant may be made for the first time in the Supreme Court. *State v. Sawyer*, 233 N.C. 76, 62 S.E.2d 515 (1950).

Misnomer.—A motion in arrest of judgment must be based on matters appearing on the face of the record or which should appear thereon and do not, and therefore motion in arrest will not lie for a misnomer, since it can be supported only by facts dehors the record. *State v. Sawyer*, 233 N.C. 76, 62 S.E.2d 515 (1950).

A motion in arrest of judgment, based upon facts which defendant alleges did not come to his knowledge until after expiration of the trial term, cannot be allowed in the Supreme Court when there is no fatal defect appearing on the face of the record. *State v. Chapman*, 221 N.C. 157, 19 S.E.2d 250 (1942).

Applied in *Chamblee v. Baker*, 95 N.C. 98 (1886); *Davenport v. Leary*, 95 N.C. 203 (1886); *City of Raleigh v. Peace*, 110 N.C. 32, 14 S.E. 521 (1892); *City of Greensboro v. McAdoo*, 110 N.C. 430, 14 S.E. 974 (1892); *City of Greensboro v. McAdoo*, 112 N.C. 359, 17 S.E. 178 (1893); *Alexander v. Alexander*, 120 N.C. 472, 27 S.E. 121 (1897); *Lucas v. Carolina Cent. Ry.*, 121 N.C. 506, 28 S.E. 265 (1897); *Baker v. Hobgood*, 126 N.C. 149, 35 S.E. 253 (1900); *McDowell v. Kent*, 153 N.C. 555, 69 S.E. 626 (1910); *State v. Ham*, 224 N.C. 128, 29 S.E.2d 449 (1944); *State v. McKnight*, 226 N.C. 766, 40 S.E.2d 419 (1946); *State v. Gentry*, 228 N.C. 643, 46 S.E.2d 863

(1948); *State v. Harris*, 229 N.C. 413, 50 S.E.2d 1 (1948); *State v. Scriven*, 232 N.C. 198, 59 S.E.2d 428 (1950); *Suits v. Old Equity Life Ins. Co.*, 241 N.C. 483, 85 S.E.2d 602 (1955); *Rigsbee v. Perkins*, 242 N.C. 502, 87 S.E.2d 926 (1955); *Travis v. Johnston*, 244 N.C. 713, 95 S.E.2d 94 (1956); *State v. Jones*, 249 N.C. 134, 105 S.E.2d 513 (1958); *State v. Mercer*, 249 N.C. 371, 106 S.E.2d 866 (1959); *State v. Pearson*, 258 N.C. 188, 128 S.E.2d 251 (1962); *State v. Brown*, 263 N.C. 786, 140 S.E.2d 413 (1965); *Nicholson v. Dean*, 267 N.C. 375, 148 S.E.2d 247 (1966).

Quoted in *Bailey v. Westmoreland*, 251 N.C. 843, 112 S.E.2d 517 (1960); *Jocie Motor Lines, Inc. v. International Bhd. of Teamsters*, 260 N.C. 315, 132 S.E.2d 697 (1963).

Stated in *E.L. Lowie & Co. v. Atkins*, 245 N.C. 98, 95 S.E.2d 271 (1956).

Cited in *Curlee v. Scales*, 223 N.C. 788, 28 S.E.2d 576 (1944); *State v. Scoggins*, 225 N.C. 71, 33 S.E.2d 473 (1945); *Wayne County Bd. of Educ. v. Lewis*, 231 N.C. 661, 58 S.E.2d 725 (1950); *State v. Dover*, 231 N.C. 735, 61 S.E.2d 63 (1950); *State v. Liles*, 232 N.C. 622, 61 S.E.2d 603 (1950); *Morgan v. High Penn Oil Co.*, 236 N.C. 615, 73 S.E.2d 477 (1952); *State v. Gordon*, 241 N.C. 356, 85 S.E.2d 322 (1955); *Cannon v. City of Wilmington*, 242 N.C. 711, 89 S.E.2d 595 (1955); *Hughes v. Anchor Enterprises, Inc.*, 245 N.C. 131, 95 S.E.2d 577 (1956); *Woody v. Pickelsimer*, 248 N.C. 599, 104 S.E.2d 273 (1958); *Harriet Cotton Mills v. Local 578*, 251 N.C. 218, 111 S.E.2d 457 (1959); *State v. Thornton*, 251 N.C. 658, 111 S.E.2d 901 (1960); *State v. Wilson*, 252 N.C. 640, 114 S.E.2d 786 (1960); *Tindal v. Mills*, 265 N.C. 716, 144 S.E.2d 902 (1965); *Gasque v. State*, 271 N.C. 323, 156 S.E.2d 740 (1967).

II. CORROBORATIVE AND CONTRADICTORY EVIDENCE.

Effect of Rule. — This rule relieves the trial judge of the duty of instructing specially upon the nature of corroborative or impeaching evidence, unless specially requested. *Westfeldt v. Adams*, 135 N.C. 591, 47 S.E. 816 (1904).

Failure to refer in the charge to the difference between substantive evidence and corroborative evidence and to define each of these terms is not ground for exception. *State v. Lee*, 248 N.C. 327, 103 S.E.2d 295 (1958).

Evidence Competent for Some Purpose. —When evidence is competent for some purpose, its general admission is not reversible error unless the appellant asks at

the time of the admission that it be restricted. *Tise v. Town of Thomasville*, 151 N.C. 281, 65 S.E. 1007 (1909).

When evidence competent for one purpose only and not for another is offered, it is incumbent upon the objecting party to request the court to restrict the consideration of the jury to that aspect of the evidence which is competent. *State v. Jennings*, 5 N.C. App. 132, 167 S.E.2d 784 (1969).

Ordinarily, where evidence admissible for some purposes, but not for all, is admitted generally, its admission will not be held for error unless the appellant requested at the time of its admission that its purpose be restricted. *State v. Corl*, 250 N.C. 252, 108 S.E.2d 608 (1959).

When evidence competent for some purposes, but not for all, is admitted generally, unless appellant asks at the time of the admission that its purpose be restricted, or requests special instructions to that effect, the failure of the judge to so restrict it is not assignable for error. *Hill v. Bean*, 150 N.C. 436, 64 S.E. 212 (1909).

Where evidence, admissible only for the purpose of attacking the credibility of a witness, is admitted generally without objection, there is no error in the court's failure to so restrict its use. *State v. McKinnon*, 223 N.C. 160, 25 S.E.2d 606 (1943).

Where the evidence to which exceptions relate is competent for purpose of corroboration, and the record fails to show that appellant asked, at the time, that its purpose be restricted, the admission of the statements will not be ground for exception. *Humphries v. Queen City Coach Co.*, 228 N.C. 399, 45 S.E.2d 546 (1947).

Where evidence competent for the purpose of corroboration is admitted generally, and defendant fails at the time of its admission to request that its purpose be restricted, his exception to the admission of the testimony cannot be sustained. *State v. Walker*, 226 N.C. 458, 38 S.E.2d 531 (1946).

Where blouse introduced had certain tears about the shoulder, and prosecutrix and another witness testified that on night of alleged assault blouse prosecutrix had on was torn about the shoulder, the admission of the blouse in evidence was competent to corroborate witnesses, and, in absence of request to limit it to corroboration, it was competent for general purposes. *State v. Petry*, 226 N.C. 78, 36 S.E.2d 653 (1946).

Evidence Not Competent for Any Purpose against Objecting Party.—The portion of this rule which reads, "nor will it

be ground of exception that evidence competent for some purposes, but not for all, is admitted generally, unless the appellant asks, at the time of admission, that its purpose shall be restricted," refers to a factual situation where the evidence is competent for some purpose, but not for all, against the objecting defendant, e.g., where the evidence is competent for the purpose of corroborating or contradicting the testimony of a witness. This clause has no application when, as in the instant case, the evidence is not competent for any purpose against the objecting defendant. *State v. Franklin*, 248 N.C. 695, 104 S.E.2d 837 (1958).

Evidence Competent When Introduced.

—Where plaintiff sued for divorce on ground of adultery and defendant in cross action alleged adultery on the part of plaintiff but at close of evidence withdrew her cross action, it was held that since evidence of adultery on the part of plaintiff was competent at the time of its introduction and there was no motion to strike when defendant withdrew cross action, plaintiff was not unduly prejudiced by its admission. *Ziglar v. Ziglar*, 226 N.C. 102, 36 S.E.2d 657 (1946).

Exception Not Considered.—A witness may testify to statements he had made to the defendant's agent when in corroboration of his testimony; and where the record states that it was confined to that purpose, or there was no request made that it be so confined, it will not be considered as reversible error on appeal. *Whitehurst v. Padgett*, 157 N.C. 424, 73 S.E. 240 (1911); *Perry v. Branning Mfg. Co.*, 176 N.C. 68, 97 S.E. 162 (1918); *Singleton v. Roebuck*, 178 N.C. 201, 100 S.E. 313 (1919).

When the evidence is corroborative, the failure of the trial court to restrict it will not be considered on appeal unless the objecting party asks for an instruction to that effect. *Chrisco v. Yow*, 153 N.C. 434, 69 S.E. 422 (1910); *Cooper v. Seaboard Air Line R.R.*, 163 N.C. 150, 79 S.E. 418 (1913).

Where several witnesses testified to certain facts which the trial judge at the time stated were competent only for the purpose of corroboration, and when charging the jury in reciting the testimony of one of these witnesses he repeated that it was to be considered only for the purpose of corroboration, but failed to do so in reciting the testimony of other witnesses, an exception to such omission cannot be sustained, in the absence of a request to charge that the same rule applied to all

of the testimony of that class. *Liles v. Lumber Co.*, 142 N.C. 39, 54 S.E. 795 (1906).

Objection That Instruction Insufficient.—Where the declarations of a party to an action are admissible as to him alone, and the judge has so instructed the jury, an objection that the instruction was not sufficiently definite will not be sustained, unless there was a request to make it so, which was refused. *Plemmons v. Murphey*, 176 N.C. 671, 97 S.E. 648 (1918).

Error in Restricting Evidence Harmless.—In view of this rule, a charge which informed the jury that the testimony was to be considered solely in impeachment of a witness, even if error, was harmless. *Medlin v. County Bd. of Educ.*, 167 N.C. 239, 83 S.E. 483 (1914).

Unsupported Statements of Appellant.—

A statement in the assignments of error, when there is nothing in the statement or record of the case on appeal to give it any support, is only the unsupported statement of the appellant of what had occurred, and hence the assignment of error depending thereon will not be considered on appeal. *State v. Freeze*, 170 N.C. 710, 86 S.E. 1000 (1915).

Where the charge of the court is not set out in the record on appeal, the presumption is in favor of its correctness, and that the appellant would otherwise have excepted, and especially so when it is stated that the judge charged the jury at length concerning the case. *State v. Jones*, 182 N.C. 781, 108 S.E. 376 (1921).

22. Printing Transcripts

Twenty-five copies of the transcript in every case docketed, except in pauper appeals, shall be printed and filed immediately after the case has been docketed, unless printed before the case has been docketed, in which event the printed copies shall be filed when the case is docketed. It shall not be necessary to print the summons and other papers showing service of process, if a statement signed by counsel is printed giving the names of all the parties and stating that summons has been duly served. Nor shall it be necessary to print formal parts of the record showing the organization of the court, the constitution of the jury, etc.

In pauper appeals the counsel for appellant may file nine legible typewritten copies of his brief, in lieu of printed copies, if he so elects, and such briefs must give a succinct statement of the facts applicable to the exceptions and the authorities relied on, and in pauper appeals the appellant may also file, in lieu of printed copies, if he so elects, nine legible typewritten copies of the transcript, in addition to the original transcript. Should the appellant gain the appeal, the cost of preparing the typewritten briefs or transcripts shall be taxed against the appellee, provided receipted statement of such cost is given the clerk of this Court before the case is decided. The arrangement of the matter in the printed transcript shall follow the order prescribed by Rule 19.

Cross References.—As to mimeographed records and briefs, see Rule 25. See also note to Rule 24. As to appeals from civil suits in forma pauperis generally, see § 1-288 and note thereto. As to appeals in forma pauperis in criminal actions, see § 15-181 and note thereto.

Rule Mandatory.—The rule of practice in the Supreme Court requiring appellant in appeals in forma pauperis to file nine typewritten copies of his brief and of the transcript, in addition to the original transcript, is mandatory, and a compliance with its provisions is necessary to entitle the appellant to have his appeal decided on its merits. *Wachovia Bank & Trust Co. v. Miller*, 191 N.C. 787, 133 S.E. 97 (1926); *Wishon v. Gastonia Weaving Co.*, 220 N.C. 420, 17 S.E.2d 509 (1941).

Upon appeal to the Supreme Court in forma pauperis, the appellant is required

to file nine typewritten copies of his brief upon penalty of having his case dismissed, and printed briefs must be filed by the appellee for him to be heard on the oral argument. *Fisher v. Toxaway Co.*, 171 N.C. 547, 88 S.E. 887 (1916).

The nine typewritten copies must be legible. *Wishon v. Gastonia Weaving Co.*, 220 N.C. 420, 17 S.E.2d 509 (1941).

An appeal to the Supreme Court will be dismissed if the appellant fails to comply with the rule, requiring the appellant, in pauper appeals, when docketing the appeal, to file nine typewritten copies of the record, including case on appeal and briefs; and that the brief of the appellant be prefaced by a clear and concise statement, showing the nature of the case and the facts bearing upon the assignments of error; and this is required whether the appellant may have received notice of the rule

from the Supreme Court clerk or not. *Estes v. Rash*, 170 N.C. 341, 87 S.E. 109 (1915).

The omission in an affidavit to appeal in forma pauperis of the averment that it was made "in good faith" is of a matter of jurisdiction; and the appeal must be dis-

missed on motion, as a matter of right, and is not one of discretion. *State v. Smith*, 152 N.C. 842, 67 S.E. 965 (1910).

Applied in *State v. Hopkins*, 217 N.C. 324, 7 S.E.2d 566 (1940); *State v. Scriven*, 232 N.C. 198, 59 S.E.2d 428 (1950).

23. How Printed

The transcript on appeal shall be printed under the direction of the clerk of this Court, and in the same type and style, and pages of same size as the reports of this Court, unless it is printed before the appeal is docketed in the required style and manner. If it is to be printed here the appellant or the party sending up the appeal shall send therewith to the clerk of this Court a cash deposit, sufficient to cover the cost of printing, which shall include 10 cents per page for the clerk of this Court, to recompense him for his services in preparing the transcript in proper shape for the printer.

When it appears that the clerk has waived the requirement of a cash deposit by appellant to cover estimated cost of printing, and the cost of printing has not been paid when the case is called for argument, the Court will in its discretion, on motion of counsel for appellee or a statement by the clerk, dismiss the appeal.

Purpose of Rule.—This rule is for the purpose of preserving printed briefs and records in bound volumes of uniform size, for the use of the Supreme Court, and must be complied with. *Howard v. Western Union Tel. Co.*, 170 N.C. 495, 87 S.E. 313 (1915).

Appeal Dismissed if Deposit Not Made.—If the record has not been printed, and

appellant has failed to make the deposit in the clerk's office required to cover the cost of printing the same, on motion duly made, under the rule of this Court, the appeal will be dismissed for failure to print the record as required by the rule, the laches in the case being imputable to the party appealing and not to his attorney. *State v. Charles*, 161 N.C. 286, 76 S.E. 715 (1912).

24. Appeal Dismissed if Transcript Not Printed or Mimeographed

If the transcript on appeal (except in pauper appeals) shall not be printed or mimeographed as required by the rules, by reason of the failure of the appellant to send up the transcript or deposit the cost therefor in time for it to be printed, when called in its regular order (as set out in Rule 5), the appeal shall, on motion of appellee, be dismissed but the Court may, on motion of appellant, after five days' notice, at the same term, for good cause shown, reinstate the appeal, to be heard at the next term. When a cause is called and the record is not fully printed, if the appellee does not move to dismiss, the cause will be continued. The Court will hear no cause in which the rules as to printing are not complied with, other than pauper appeals.

Necessity of Printed Record.—The requirement as to printing the parts of the record which are essential to be considered on appeal is a necessity, demonstrated by the experience of the Court, and hence is not a purely arbitrary matter, to be dispensed with at will. It was not adopted without full consideration, and its nonobservance will not be excused without a good cause. *Barnes v. Crawford*, 119 N.C. 127, 25 S.E. 791 (1896).

Appeal Dismissed When Record Not Printed.—If the record has not been printed, and appellant has failed to make the deposit in the clerk's office required to cover the cost of printing the same, on

motion duly made, under the rule of this Court, the appeal will be dismissed for failure to print the record. *Stroud v. Western Union Tel. Co.*, 133 N.C. 253, 45 S.E. 592 (1903); *State v. Charles*, 161 N.C. 286, 76 S.E. 715 (1912).

Judgment for Costs Final.—A judgment in the Supreme Court dismissing an appeal for the failure of appellant to print the record and taxing him with costs, is final, without authority in the lower court to permit him to recover them. *Midgett v. Vann*, 158 N.C. 128, 73 S.E. 801 (1912).

Appellant Not in Default.—Denial of a motion to dismiss because the appeal was not docketed and printed ready for argu-

ment within the time prescribed is proper only where appellant is not in default. Board of Water & Light Comm'rs v. Chapman, 151 N.C. 327, 66 S.E. 221 (1909).

Negligence of Counsel No Excuse.—The printing of a record on appeal requires no legal skill and, hence, the negligence of counsel is no excuse for the failure to print and where an appeal has been dismissed for such failure a motion to reinstate will not be allowed. Griffin v. Nelson, 106 N.C. 235, 11 S.E. 414 (1890); Neal v. Old North State Land Co., 112 N.C. 841, 17 S.E. 538 (1893); Dunn v. Underwood, 116 N.C. 525, 20 S.E. 965 (1895).

Delay of Appellant No Excuse. — If a party will delay sending up his transcript to the last minute, he should either send it up with the requisite parts of the record printed, or arrange to have it promptly done here. It is no excuse for an appellant to delay docketing his appeal till the time left between the docketing and calling the case for argument is perhaps too brief in which to print the record. Stainback v. Harris, 119 N.C. 107, 25 S.E. 858 (1896); Truelove v. Norris, 152 N.C. 755, 67 S.E. 487 (1910).

Ignorance of Requirement as to Printed Record.—Where, in the absence of appellant's counsel, an appeal was dismissed because of appellant's failure to have the record printed, a motion to reinstate, because the appellant did not know that a printed record was required in an appeal like this from an order in the case, will be denied, where it appears that appellant has been otherwise guilty of laches in the prosecution of his appeal. Stephens v. Koonce, 106 N.C. 255, 11 S.E. 282 (1890).

Request That Clerk Print Record. — A mere request by appellant of the clerk of the Court to have the record printed, and the bill sent appellant, without further attention by appellant, though he receives no bill, will not justify a reinstatement of his appeal, dismissed for lack of printed record. Carter v. Long, 116 N.C. 44, 20 S.E. 1013 (1895).

Lack of Money as Excuse for Failure to Print.—One not appealing in forma pauperis must comply, notwithstanding his inability to raise the money necessary for the printing of the record, with the rule of court requiring such printing. Rencher v. Anderson, 93 N.C. 105 (1885). And a motion to reinstate the case will be denied. Turner v. Tate, 112 N.C. 457, 17 S.E. 72 (1893).

Time within Which Record Must Be Printed.—The rule requiring a printed record is satisfied if the record has been

printed when the cause is called for argument. Smith v. Montague, 121 N.C. 92, 28 S.E. 137 (1897); Armour Packing Co. v. Williams, 122 N.C. 406, 29 S.E. 366 (1898).

Misunderstanding as to Time of Printing.—Where there was an honest misunderstanding between counsel in regard to making up the case on appeal, and the case had not been made up when the case was heard in the appellate court, the record having been docketed without a case, and counsel for appellant supposed that there was no necessity of printing the record until the case came up, and the appellee moved to dismiss, which was allowed, it was proper to reinstate the appeal. Rencher v. Anderson, 94 N.C. 661 (1886).

When Cause Docketed Too Late for Hearing. — Where a cause was docketed too late for hearing at a term of the Supreme Court, a motion to dismiss for failure to print the record must be denied. Gupton v. Sledge, 161 N.C. 213, 76 S.E. 527 (1912); Bumgarner v. Thornton Light & Power Co., 76 S.E. 528 (N.C. 1912).

Printing Index.—When any part of the record on appeal is printed, the indexes and marginal references should also be printed. Alexander v. Alexander, 120 N.C. 472, 27 S.E. 121 (1897); Lucas v. Carolina Cent. Ry., 121 N.C. 506, 28 S.E. 265 (1897); Pretzfelder v. Merchants Ins. Co., 123 N.C. 164, 31 S.E. 470 (1898).

Attorney Absent When Appeal Dismissed.—Where, in the absence of appellant's counsel, an appeal was dismissed because of appellant's failure to have the record printed as therein required, the cause will not be reinstated. Avery v. Pritchard, 106 N.C. 344, 11 S.E. 281 (1890).

Failure to Transmit Sufficient Copies.—An appeal which has been dismissed for appellant's failure to print the copies of the record will be reinstated on affidavits of appellant and others that he caused the requisite number of copies to be printed, but, owing to a misunderstanding of the instructions given him by his counsel and the clerk of the superior court, to whom he applied for information, he sent only one printed copy to the Supreme Court. Smith v. Summerfield, 107 N.C. 580, 12 S.E. 465 (1890).

When Motion to Reinstate Made. — A motion to reinstate an appeal dismissed for failure to print must be made at the same term, and will only then be allowed for good cause shown. Pipkin v. Green, 112 N.C. 355, 17 S.E. 534 (1893).

Applied in *Witt v. Long*, 93 N.C. 388 (1885); *Horton v. Green*, 104 N.C. 400, 10 S.E. 470 (1889); *Whitehurst v. Pettipher*, 105 N.C. 39, 10 S.E. 857 (1890); *In re Berry*, 107 N.C. 326, 12 S.E. 125 (1890); *Hunt v. Richmond & Danville R.R.*, 107 N.C. 447, 12 S.E. 378 (1890); *Hinton v. Pritchard*, 108 N.C. 412, 12 S.E. 838 (1891); *Rodman v. Archbell*, 108 N.C. 413, 13 S.E. 111 (1891); *Edwards v. Henderson*, 109 N.C. 83, 13 S.E. 779 (1891); *Dunn v. Un-*

derwood, 116 N.C. 525, 20 S.E. 965 (1895); *Wiley v. Bessemer City Mining Co.*, 117 N.C. 489, 23 S.E. 448 (1895); *Thurber v. Eastern Bldg. & Loan Ass'n*, 118 N.C. 129, 24 S.E. 730 (1896); *Walters v. Starnes*, 118 N.C. 842, 24 S.E. 713 (1896); *Barnes v. Crawford*, 119 N.C. 127, 25 S.E. 791 (1896); *Hicks v. Royal*, 122 N.C. 405, 29 S.E. 413 (1898); *Bradshaw v. Stansberry*, 164 N.C. 356, 79 S.E. 302 (1913).

25. Mimeographed Records and Briefs

Counsel may file in lieu of printed records and briefs 25 mimeographed copies thereof, to be prepared under the immediate supervision and direction of the clerk of this Court, the cost of such copies not to exceed \$1.15 per page of an average of 40 lines and 400 words to the page: Provided, however, that it shall be permissible and optional with counsel to file printed transcripts and briefs when it is possible to print such documents without unnecessary delay and inconvenience to the Court and appellee's counsel, and within time for an appeal to be heard in its regular order under Rule 5.

The clerk of this Court is required to purchase the stencil sheets, arrange all matter to be mimeographed for the operator, to supervise the work and to index the mimeographed transcripts and mail copies promptly to counsel. A cash deposit covering estimated cost of this work is required as in Rule 23 under the same penalty as therein prescribed for failure to pay the account due for such work.

In criminal actions, counsel for appellant, upon delivering a copy of his manuscript record of the statement of the case on appeal, as agreed to by counsel or as settled by the court, to the clerk of this Court to be printed or mimeographed, shall file an extra copy with the clerk for use by the Attorney General.

26. Cost of Printing and Mimeographing Transcripts and Briefs to Be Recovered

The actual cost of printing the transcript of appeal and of the brief shall be allowed the successful litigant, not to exceed \$1.50 per page, and not exceeding sixty pages for a transcript and twenty pages for a brief, unless otherwise specially ordered by the Court, and he shall be allowed 10 cents additional for each such page paid to the clerk of this Court for making copy for the printer, unless the transcript was printed before the case was docketed: provided receipted statement of such cost is given the clerk before the case is decided. In pauper appeals the actual cost of preparing typewritten copies of the transcript of appeal and of the brief shall be allowed the appellant, not to exceed twenty-five cents per page and not to exceed sixty pages for transcript and twenty pages for brief.

Judge and counsel should not encumber the "case on appeal" with evidence or with matters not pertinent to the exceptions taken. When the case is settled, either by the judge or the parties, if either party deems that unnecessary matter is incorporated, he shall have his exception noted, designating the parts deemed unnecessary, and if, upon hearing the appeal, the Court finds that such parts were in fact unnecessary, the cost of making the transcript of such unnecessary matter and of printing the same shall be taxed against the party at whose instance it was incorporated into the transcript, as required by Rule 22, no matter in whose favor the judgment is given here, except when such party has already paid the expense of such unnecessary matter, and in that event he shall not recover it back, though successful on his appeal. Motions for taxation of costs for copying and printing unnecessary parts sent up in the manuscript shall be decided without argument.

A successful litigant shall recover the actual cost of mimeographing a transcript or brief, not to exceed sixty pages of a transcript and twenty pages of a brief, unless otherwise ordered as herein provided in this rule.

Cross Reference.—As to costs on appeal generally, see § 6-33.

Stenographer's notes of the trial should be sent up on appeal only as to matters involved in the inquiry; but when settlement of the case was delayed so long that the trial judge could not separate the material parts, a motion that costs of such should not be taxed against appellee will not be granted. *Asheville Supply & Foundry Co. v. Machin*, 150 N.C. 738, 64 S.E. 887 (1909).

Evidence Not Sent Up in Narrative Form.—Upon objection duly entered to the sending up on appeal of the stenographer's notes with questions and answers, instead of in a narrative form, the unnecessary additional pages thus made will be taxed against the party at whose instance it is done. *Brazille v. Carolina Barytes Co.*, 157 N.C. 454, 73 S.E. 215 (1911); *Overman v. Lanier*, 157 N.C. 544, 73 S.E. 192 (1911).

Charge Uselessly Included.—Where a party insists that the entire charge of the trial judge should be sent up on appeal as a part of the record, and this has been uselessly done over the objection of the opposing party, being unnecessary to the proper presentation of the matters of law involved, the motion of the latter, upon notice, to retax the cost for the full amount of the printed record, will be sustained. *Roanoke R.R. & Lumber Co. v. Privette*, 179 N.C. 1, 101 S.E. 489 (1919). See also *Yow v. Hamilton*, 136 N.C. 357, 48 S.E. 782 (1904); *Waldo v. Wilson*, 177 N.C. 461, 100 S.E. 182 (1919).

Excess over Limitation Not Taxed against Losing Party.—Costs of brief exceeding twenty pages will not be taxed against the unsuccessful party, under the rule of the Supreme Court. *Brown v. Harding*, 172 N.C. 835, 90 S.E. 3 (1916).

When Excess Taxed against Losing Party.—The successful party on appeal will not be allowed to recover costs for printing record in excess of the amount prescribed by this rule, except in extraordinary cases where the necessity for such printing is made to appear. *Town of Durham v. Richmond & Danville R.R.*, 108 N.C. 399, 12 S.E. 1040, 13 S.E. 1 (1891); *Roberts v. Lewald*, 108 N.C. 405, 12 S.E. 1028 (1891).

Where the defendant is the successful party on appeal, and on his motion to retax costs in the Supreme Court it appears that there was no unnecessary or superfluous matter in the transcript, and that the whole thereof was pertinent and necessary to a proper statement of the facts upon which the assignments of error was based, and the allowance specifically made in this rule was not sufficient to pay for the cost of printing, which is not denied by the other party, it presents a proper instance for the court to specially order that the full cost of printing the transcript be taxed against the plaintiff and the surety on his prosecution bond. *Hardy v. Phoenix Mut. Life Ins. Co.*, 167 N.C. 569, 83 S.E. 801 (1914).

Where the record was in excess of that required to properly present the appeal, the appellee at whose instance it was done was taxed with the cost of mimeographing it for the excess over the sixty pages allowed by this rule. *Page Trust Co. v. Pumpelly*, 194 N.C. 580, 140 S.E. 212 (1927).

When Subject Matter of Appeal Destroyed.—Where the subject matter of the action is destroyed before the appeal is heard, the judgment below is presumed to be correct until reversed, and no part of the costs should be adjudged against the appellee. *Taylor v. Vann*, 127 N.C. 243, 37 S.E. 263 (1900).

27. Briefs

Twenty-five printed or mimeographed copies of briefs of both parties shall be filed in all cases (except in pauper appeals, as provided in Rule 22). Such briefs may be sent up by counsel ready printed, or they may be printed or mimeographed under the supervision of the clerk of this Court if a proper deposit for cost is made, as specified in Rule 23. They must be of the size and style prescribed by such rule. The briefs are expected to cover all the points presented in the oral argument, though additional authorities may be cited if discovered after brief is filed, by furnishing list to opposing counsel and handing memorandum of same to the marshal to be placed by him with the papers in the case, but counsel will not be permitted to consume time on the argument in the citation of additional authorities.

Cross Reference.—See note to Rule 28.

Brief Not in Accordance with Rules.—An appeal will be dismissed where there is a failure to print the record and briefs in accordance with the rules of the Supreme Court. *Bradshaw v. Standsberry*, 164 N.C. 356, 79 S.E. 302 (1913).

When No Brief Filed.—Where the appellant has not filed a brief in the Supreme Court, under the rule the judgment appealed from will be affirmed on appellee's motion, if upon examination of the records proper no error appears. *Rowe v. Campbell*, 76 S.E. 474 (N.C. 1912); *Board of Comm'rs v. R.S. Dickson & Co.*, 190 N.C. 330, 129 S.E. 726 (1925).

Where the defendant, convicted of a capital felony, fails to file a brief in the Supreme Court, the appeal will be dismissed on motion of the Attorney General after an examination of the record discloses no error. *State v. Kinyon*, 210 N.C. 294, 186 S.E. 368 (1936).

The failure to file a brief as required by this rule works an abandonment of the assignments of error, except those appearing upon the face of the record, which are cognizable *ex mero motu*. *Dillard v. Brown*, 233 N.C. 551, 64 S.E.2d 843 (1951).

27½. Statement of the Questions Involved.

The first page of appellant's brief, other than formal matters appearing thereon, shall be used exclusively for a succinct statement of the question or questions involved on the appeal. Such statement should not ordinarily exceed fifteen lines, and should never exceed one page. This will then be followed on the next page by a recital of the facts and the argument as required by the other rules. In case of disagreement as to the exact question or questions presented for determination, the appellee may submit a counter-statement, using the first page of appellee's brief for this purpose. But no counter-statement need be made unless appellee thinks appellant's statement is inaccurate, or that it does not present the points for decision in a proper light.

The statement of the questions involved or presented by the appeal, is designed to enable the Court, as well as counsel, to obtain an immediate view and grasp of the nature of the controversy; and a failure to comply with this rule may result in a dismissal of the appeal.

Rules Mandatory.—The rules of practice of the Supreme Court are mandatory. *Jim Walter Corp. v. Gilliam*, 260 N.C. 211, 132 S.E.2d 313 (1963).

Statement of Case.—A fair and succinct statement of the case should be made at the beginning of the brief, so that the Supreme Court may understand the issues and more expeditiously hear the argument and decide the case. *Balfour Quarry Co. v. West Constr. Co.*, 151 N.C. 345, 66 S.E. 217 (1909).

Assignments of Error.—The purported assignments of error will not be considered by the Court where they do not throw the slightest light on the questions the Court is asked to pass upon and do not comply with this rule. *Tillis v. Calvin Cotton Mills, Inc.*, 244 N.C. 587, 94 S.E.2d 600 (1956).

Assignments of error as to the admission of evidence did not comply with this rule. *Bridges v. Graham*, 246 N.C. 371, 98 S.E.2d 492 (1957).

Applied in *Kugler Lumber Co. v. Lat-ham*, 199 N.C. 820, 156 S.E. 128 (1930). See also *Pruitt v. Wood*, 199 N.C. 788, 156 S.E. 126 (1930); *Daniel v. Butler Lumber Co.*, 254 N.C. 504, 119 S.E.2d 397 (1961); *State Highway Comm'n v. Luck*, 263 N.C. 125, 139 S.E.2d 8 (1964); *Mangum v. Yow*, 263 N.C. 525, 139 S.E.2d 537 (1965).

Quoted in *Steelman v. Benfield*, 228 N.C. 651, 46 S.E.2d 829 (1948).

Cited in *Acme Mfg. Co. v. Kornegay*, 195 N.C. 373, 142 S.E. 224 (1928); *Caldwell v. Southern Ry.*, 218 N.C. 63, 10 S.E.2d 680 (1940); *State v. Dover*, 231 N.C. 735, 61 S.E.2d 63 (1950); *State v. Liles*, 232 N.C. 622, 61 S.E.2d 603 (1950).

28. Appellant's Brief

The brief of appellant shall set forth a succinct statement of the facts necessary for understanding the exceptions, except as to an exception that there was no evidence, it shall be sufficient to refer to pages of printed transcript containing the evidence. Such brief shall contain, properly numbered, the several grounds of exception and assignment of error with reference to printed pages of transcript,

and the authorities relied on classified under each assignment; and if statutes are material, the same shall be cited by the book, chapter, and section. Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him. Such briefs when filed shall be noted by the clerk on the docket, and a copy thereof furnished by him to opposite counsel on application.

Appellant shall, upon delivering a copy of his brief to the printer to be printed or to the clerk of this Court to be printed or mimeographed, immediately mail or deliver to appellee's counsel a copy thereof. If the printed or typewritten copies of appellant's brief have not been filed with the clerk of this Court to be mimeographed within the time required by the rules of this Court, the appeal will be dismissed on motion of appellee unless for good cause shown the Court shall give further time to print the brief.

Rules Mandatory.—The rules of practice of the Supreme Court are mandatory. *Jim Walter Corp. v. Gilliam*, 260 N.C. 211, 132 S.E.2d 313 (1963).

Failure to File in Time.—Where appellant fails to file his brief within the time prescribed, and the case on appeal contains no assignments of error or grouped exceptions, as required by the rules of the Supreme Court, a motion by appellee to dismiss will be granted. *Rosemond v. McPherson*, 156 N.C. 593, 72 S.E. 570 (1911); *In re Bailey*, 180 N.C. 30, 103 S.E. 896 (1920).

Where an appellant knows that his brief must be prepared, printed, and filed by noon of a certain day, and he takes no steps to this end, a motion to dismiss the appeal under Rule 17 will be granted. *Truelove v. Norris*, 152 N.C. 755, 67 S.E. 487 (1910).

Late filing of appellant's brief works an abandonment of the assignments of error, except those appearing on the face of the record, which are cognizable *ex mero motu*. *State v. Lynn*, 251 N.C. 703, 111 S.E.2d 866 (1960).

Delay in Docketing Transcript. — Although the transcript was not docketed till the Saturday preceding the Tuesday on which the brief should have been filed, yet, it not being clear that a brief could not be printed in one or two days, and appellant not having moved during the week preceding the call for longer time in which to print the brief, and not having had it printed at the time of the call, when the appeal was dismissed, his subsequent motion to reinstate was not granted. *Calvert v. Carstarphen*, 133 N.C. 25, 45 S.E. 353 (1903).

When Cause Docketed Too Late for Hearing. — Where a cause was docketed too late for hearing at a term of the Supreme Court, a motion to dismiss for failure to file printed briefs must be denied. *Gupton v. Sledge*, 161 N.C. 213, 76 S.E. 527 (1912); *Bumgarner v. Thornton Light & Power Co.* 76 S.E. 528 (N.C. 1912); *Mc-*

Lean v. McDonald, 175 N.C. 418, 95 S.E. 769 (1918).

Failure to File Brief.—Where an appellant failed to file a brief in the Supreme Court, as required by this rule, upon motion of the Attorney General the appeal of the appellant was held properly dismissed. *State v. Pelley*, 222 N.C. 684, 24 S.E.2d 635 (1943).

Where appellant does not file a brief, his appeal will be dismissed. *Wilson v. Ervin*, 227 N.C. 396, 42 S.E.2d 468 (1947).

An appeal will be dismissed upon motion of the Attorney General for failure of defendant to file a brief, but when defendant has been convicted of a capital felony, this will be done only after a careful examination of the record fails to disclose material defect. *State v. Peele*, 220 N.C. 83, 16 S.E.2d 449 (1941); *State v. Sturdivant*, 220 N.C. 535, 17 S.E.2d 661 (1941).

Pass Briefs Insufficient.—Briefs which merely state with reference to the exceptions taken of record, "Exceptions No. 1. This question and answer are incompetent," etc., afford no assistance to the Court. They are merely pass briefs, and do not conform to the rules. *Jones v. Southern Ry.*, 164 N.C. 392, 80 S.E. 408 (1913); *State v. Gibson*, 221 N.C. 252, 20 S.E.2d 51 (1942).

Exceptions Not Discussed Deemed Abandoned.—It is necessary that exceptions appearing in the record on appeal be mentioned in appellant's brief, with reason or argument to support them, to entitle them to be considered by the Court, for otherwise they are taken as abandoned. *State v. Barnhill*, 186 N.C. 446, 119 S.E. 894 (1923); *Austin v. Crisp*, 186 N.C. 616, 120 S.E. 199 (1923); *In re Will of Fuller*, 189 N.C. 509, 127 S.E. 549 (1925). See *State v. Wells*, 209 N.C. 358, 183 S.E. 282 (1936); *Stephenson v. Honeycutt*, 209 N.C. 701, 184 S.E. 482 (1936); *Sparks v. Holland*, 209 N.C. 705, 184 S.E. 552 (1936); *Hicks v. Nivens*, 210 N.C. 44, 185 S.E. 469 (1936); *Taylor v. Rierison*, 210 N.C. 185, 185 S.E.

627 (1936); *Texas Co. v. City of Elizabeth City*, 210 N.C. 454, 187 S.E. 551 (1936); *Wilson v. Williams*, 215 N.C. 407, 2 S.E.2d 19 (1939); *In re Escoffery*, 216 N.C. 19, 3 S.E.2d 425 (1939); *State v. Cox*, 217 N.C. 177, 7 S.E.2d 473 (1940); *Rose v. Bank of Wadesboro*, 217 N.C. 600, 9 S.E.2d 2 (1940); *State v. Howley*, 220 N.C. 113, 16 S.E.2d 705 (1941); *Bank of Pilot Mountain v. Snow*, 221 N.C. 14, 18 S.E.2d 711 (1942); *State v. Gibson*, 221 N.C. 252, 20 S.E.2d 51 (1942); *Brown v. Ward*, 221 N.C. 344, 20 S.E.2d 324 (1942); *Moyle v. Hopkins*, 222 N.C. 33, 21 S.E.2d 826 (1942); *Edgewood Knoll Apts. v. Braswell*, 239 N.C. 560, 80 S.E.2d 653 (1954); *State v. Atkins*, 242 N.C. 294, 87 S.E.2d 507 (1955); *Hardison v. Gregory*, 242 N.C. 324, 88 S.E.2d 96 (1955); *In re Will of Knight*, 250 N.C. 634, 109 S.E.2d 470 (1959); *Evans v. Queen City Coach Co.*, 251 N.C. 324, 111 S.E.2d 187 (1959); *State v. Williams*, 255 N.C. 82, 120 S.E.2d 442 (1961).

Exceptions and assignments of error not brought forward in the brief are deemed abandoned. *Tart v. Register*, 257 N.C. 161, 125 S.E.2d 754 (1962); *State v. Battle*, 271 N.C. 594, 157 S.E.2d 14 (1967); *State v. Wyatt*, 271 N.C. 596, 157 S.E.2d 96 (1967); *State v. Pardon*, 272 N.C. 72, 157 S.E.2d 698 (1967); *State v. Williams*, 272 N.C. 273, 158 S.E.2d 85 (1967); *State v. Davis*, 272 N.C. 469, 158 S.E.2d 630 (1968); *Knutton v. Cofield*, 273 N.C. 355, 160 S.E.2d 29 (1968); *Capune v. Robins*, 273 N.C. 581, 160 S.E.2d 881 (1968); *State v. Covington*, 273 N.C. 690, 161 S.E.2d 140 (1968).

Assignments of error not set out in appellant's brief and in respect to which no reason or argument is stated or authority cited will be deemed abandoned. *Young v. Lowie*, 265 N.C. 456, 144 S.E.2d 204 (1965).

Mere reference to exceptions of record made in the brief, without argument or citation of authority, is not a compliance with this rule. *Ingle v. Southern Ry.*, 167 N.C. 636, 83 S.E. 744 (1914).

Exceptions not set up in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned. *Gray v. Cartwright*, 174 N.C. 49, 93 S.E. 432 (1917). See *State v. Tate*, 210 N.C. 613, 188 S.E. 91 (1936); *Moore v. New York Life Ins. Co.*, 266 N.C. 440, 146 S.E.2d 492 (1966).

Statements made in appellant's brief, that he has ten assignments of error and insists upon them all, do not come within this rule, and they will not be considered; the requirements being that there must be some reason or argument in their

support set out in the brief. *Watkins v. Lawson*, 166 N.C. 216, 81 S.E. 623 (1914).

Exceptions in the record not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned. *Hyatt v. McCoy*, 194 N.C. 760, 140 S.E. 807 (1927); *Ludford v. Combs*, 195 N.C. 851, 141 S.E. 541 (1928); *Grant v. Tallassee Power Co.*, 196 N.C. 617, 146 S.E. 531 (1929); *Andrews Music Store v. Boone*, 197 N.C. 174, 148 S.E. 39 (1929); *State v. Hill*, 225 N.C. 74, 33 S.E.2d 470 (1945); *State v. Britt*, 225 N.C. 364, 34 S.E.2d 408 (1945); *Troitino v. Goodman*, 225 N.C. 406, 35 S.E.2d 277 (1945); *Clark v. Cagle*, 226 N.C. 230, 37 S.E.2d 672 (1946); *State v. Frye*, 229 N.C. 581, 50 S.E.2d 895 (1948); *State v. Muse*, 230 N.C. 495, 53 S.E.2d 529 (1949); *Williams v. Williams*, 231 N.C. 33, 56 S.E.2d 20 (1949); *State v. Wiggins*, 232 N.C. 619, 61 S.E.2d 611 (1950); *Weaver v. Morgan*, 232 N.C. 642, 61 S.E.2d 916 (1950); *State v. Thomas*, 244 N.C. 212, 93 S.E.2d 63 (1956); *Henderson Cotton Mills v. Local 584*, 251 N.C. 240, 111 S.E.2d 471 (1959); *State v. Rose*, 251 N.C. 281, 111 S.E.2d 311 (1959); *State v. Coleman*, 253 N.C. 799, 117 S.E.2d 742 (1961); *Sandy v. Stackhouse, Inc.*, 258 N.C. 194, 128 S.E.2d 218 (1962); *State v. Arnold*, 258 N.C. 563, 129 S.E.2d 229 (1963); *State v. Spence*, 271 N.C. 23, 155 S.E.2d 802 (1967).

Exceptions not set out in the brief and in support of which no argument is given, are deemed abandoned. *State v. Randolph*, 228 N.C. 228, 45 S.E.2d 132 (1947); *State v. Brown*, 233 N.C. 202, 63 S.E.2d 99 (1951).

Where an exception is not argued in the brief it is taken as abandoned. *Randle v. Grady*, 228 N.C. 159, 45 S.E.2d 35 (1947).

Exceptions not set out in defendants' brief are considered abandoned. *State v. Thompson*, 224 N.C. 661, 32 S.E.2d 24 (1944). See *State v. Stone*, 226 N.C. 97, 36 S.E.2d 704 (1946); *State v. Malpass*, 226 N.C. 403, 38 S.E.2d 156 (1946); *Elliott v. Killian*, 242 N.C. 471, 87 S.E.2d 903 (1955); *Friday v. Adams*, 251 N.C. 540, 111 S.E.2d 893 (1960); *State v. Strickland*, 254 N.C. 658, 119 S.E.2d 781 (1961); *Bass v. Mecklenburg County*, 258 N.C. 226, 128 S.E.2d 570 (1962).

Exceptions not argued or referred to in appellant's brief are deemed abandoned. *State v. Smith*, 223 N.C. 457, 27 S.E.2d 114 (1943); *State v. Epps*, 223 N.C. 741, 28 S.E.2d 219 (1943); *State v. Hart*, 226 N.C. 200, 37 S.E.2d 487 (1946).

Exceptions not discussed in appellant's brief are deemed abandoned. *Gillis v.*

Great Atl. & Pac. Tea Co., 223 N.C. 470, 27 S.E.2d 283 (1943); *Merchant v. Lassiter*, 224 N.C. 343, 30 S.E.2d 217 (1944); *State v. Reid*, 230 N.C. 561, 53 S.E.2d 849 (1949); *Henderson Cotton Mills v. Local 584*, 251 N.C. 234, 111 S.E.2d 476 (1959).

Assignments of error, without reason, argument, or authority in the brief to support them, will not be considered on appeal. *Hopkins v. Colonial Stores, Inc.*, 224 N.C. 137, 29 S.E.2d 455 (1944); *State v. Hightower*, 226 N.C. 62, 36 S.E.2d 649 (1946); *Ford v. Blythe Bros. Co.*, 242 N.C. 347, 87 S.E.2d 879 (1955).

Assignments of error not brought forward and discussed in appellant's brief are deemed abandoned. *State v. Jones*, 227 N.C. 94, 40 S.E.2d 700 (1946). See *State v. Carroll*, 226 N.C. 237, 37 S.E.2d 688 (1946); *State v. Cogdale*, 227 N.C. 59, 40 S.E.2d 467 (1946); *State v. Fairley*, 227 N.C. 134, 41 S.E.2d 88 (1947); *Bell v. Brown*, 227 N.C. 319, 42 S.E.2d 92 (1947); *State v. Avery*, 236 N.C. 276, 72 S.E.2d 670 (1952); *Little v. Power Brake Co.*, 255 N.C. 451, 121 S.E.2d 889 (1961); *State v. Hart*, 256 N.C. 645, 124 S.E.2d 816 (1962); *State v. Woolard*, 260 N.C. 133, 132 S.E.2d 364 (1963); *Taylor v. Twin City Club*, 260 N.C. 435, 132 S.E.2d 865 (1963); *White v. Cothran*, 260 N.C. 510, 133 S.E.2d 132 (1963); *State v. Goldberg*, 261 N.C. 181, 134 S.E.2d 334 (1964); *State v. Anderson*, 263 N.C. 124, 139 S.E.2d 6 (1964); *State v. Fenner*, 263 N.C. 694, 140 S.E.2d 349 (1965); *Martin v. Underhill*, 265 N.C. 669, 144 S.E.2d 872 (1965); *State v. Stubbs*, 266 N.C. 295, 145 S.E.2d 899 (1966); *McDonald v. Moore Sheet Metal & Heating Co.*, 268 N.C. 496, 151 S.E.2d 27 (1966).

Exceptions which are not supported by any argument or citations in the brief are deemed abandoned. *State v. Feaganes*, 272 N.C. 246, 158 S.E.2d 89 (1967).

Exception not discussed in the brief is deemed abandoned. *King Homes, Inc. v. Bryson*, 273 N.C. 84, 159 S.E.2d 329 (1968).

Assignments of error set forth in the record but not brought forward in the brief are deemed abandoned. *Long v. Thompson*, 267 N.C. 310, 148 S.E.2d 127 (1966).

Assignments of error are deemed abandoned where the brief contains no authority or discussion relating thereto. *Mathis v. Siskin*, 268 N.C. 119, 150 S.E.2d 24 (1966).

An exception not brought forward and discussed in defendant's brief will be taken as abandoned by defendant. *State v. Majors*, 268 N.C. 146, 150 S.E.2d 35 (1966).

An assignment of error as to the court's failure to grant a motion for a directed

verdict, not brought forward and discussed in the brief, is deemed to be abandoned. *Chalmers v. Womack*, 269 N.C. 433, 152 S.E.2d 505 (1967).

Exceptions set out in the record, and not preserved as required by this rule, are to be considered as abandoned. *Higgins v. Higgins*, 223 N.C. 453, 27 S.E.2d 128 (1943).

Exceptions to allegations not brought forward in the plaintiff's brief are abandoned. *Reliable Trucking Co. v. Payne*, 233 N.C. 637, 65 S.E.2d 132 (1951).

Exceptions to which no reason or argument is submitted are deemed abandoned. *Swinton v. Savory Realty Co.*, 236 N.C. 723, 73 S.E.2d 785 (1952).

Exceptions to the judgment of the superior court, and assignments of error based thereon, which are not brought forward in the appellant's brief and in support of which his brief cites no argument or authority, are deemed abandoned. *Branch v. State*, 269 N.C. 642, 153 S.E.2d 343 (1967).

Exceptions referred to in defendants' brief as "formal exceptions" and as to which no argument is made and no authority cited are deemed abandoned. *State v. Hunt*, 223 N.C. 173, 25 S.E.2d 598 (1943).

Assignments of error in support of which no argument is made or authority cited are deemed abandoned. *State v. Cole*, 241 N.C. 576, 86 S.E.2d 203 (1955); *State v. Faulkner*, 241 N.C. 609, 86 S.E.2d 81 (1955); *Peek v. Wachovia Bank & Trust Co.*, 242 N.C. 1, 86 S.E.2d 745 (1955); *Ammons v. Layton*, 242 N.C. 122, 86 S.E.2d 915 (1955); *Hatcher v. Clayton*, 242 N.C. 450, 88 S.E.2d 104 (1955); *Waddell v. Carson*, 245 N.C. 669, 97 S.E.2d 222 (1957); *Horton v. Redevelopment Comm'n*, 262 N.C. 306, 137 S.E.2d 115 (1964).

Assignments of error are expressly waived or abandoned for failure to bring them forward in the brief and argue them. *Becker v. Becker*, 262 N.C. 685, 138 S.E.2d 507 (1964).

While defendant had in the record assignments of error, they were not brought forward and discussed in its brief, and were deemed abandoned by it. *Spartan Equip. Co. v. Air Placement Equip. Co.*, 263 N.C. 549, 140 S.E.2d 3 (1965).

Where plaintiff's exceptions are not brought forward in his brief, they are abandoned. *Smith v. Simpson*, 260 N.C. 601, 133 S.E.2d 474 (1963).

A ground of objection not discussed by appellants in their brief is deemed abandoned. *Reynolds v. Earley*, 241 N.C. 521, 85 S.E.2d 904 (1955).

Where no reason or argument is stated or authority cited in the brief in support of an assignment of error, such assignment is taken as abandoned. *J.A. Jones Constr. Co. v. Local Union 755*, 246 N.C. 481, 98 S.E.2d 852 (1957); *State v. Newton*, 251 N.C. 151, 110 S.E.2d 810 (1959); *State v. Coffey*, 255 N.C. 293, 121 S.E.2d 736 (1961); *State v. Pearson*, 258 N.C. 188, 128 S.E.2d 251 (1962).

Where exceptions are not set out in the unsupported by argument or citation of *Stafford*, 267 N.C. 201, 147 S.E.2d 825 brief and no argument or authority is authority is deemed abandoned. *Peek v. Wachovia Bank & Trust Co.*, 242 N.C. 1, 86 S.E.2d 745 (1955).

An exception to excerpt from a charge unsupported by argument or citation of authority is deemed abandoned. *Peek v. Wachovia Bank & Trust Co.*, 242 N.C. 1, 86 S.E.2d 745 (1955).

Where an exception is carried forward in appellants' brief, but no reason or argument is stated or authority cited in support thereof, as required by this rule, the exception is taken as abandoned. *Wingler v. Miller*, 223 N.C. 15, 25 S.E.2d 160 (1943); *Penny v. Stone*, 228 N.C. 295, 45 S.E.2d 362 (1947).

In the absence of a showing, by statement of reason or argument or citation of authority, that the statute of limitations pleaded is relevant as a defense, error in striking this defense did not appear. *Dunn v. Dunn*, 242 N.C. 234, 87 S.E.2d 308 (1955).

Exceptions relating to peremptory instructions as brought forward in the brief unsupported by argument or citation of authority will be treated as abandoned. *Rhodes v. Raxter*, 242 N.C. 206, 87 S.E.2d 265 (1955).

An exception that the trial judge did not sign the judgment was taken as abandoned where no argument was stated or authority cited. *State v. Atkins*, 242 N.C. 294, 87 S.E.2d 507 (1955).

Exceptions to the refusal of the court below to sustain the defendant's motion for judgment as of nonsuit have not been brought forward in his brief and argued, as required by this rule of the rules of practice in the Supreme Court, and will therefore be considered as abandoned. *State v. Stallings*, 230 N.C. 252, 52 S.E.2d 901 (1949).

Where exceptions are not set out in the brief and no argument or authority is stated in regard to them, under this rule they are deemed abandoned. *State v. Stafford*, 267 N.C. 201, 147 S.E.2d 925 (1966); *State v. Withers*, 271 N.C. 364, 156

S.E.2d 733 (1967); *Freeman v. City of Charlotte*, 373 N.C. 113, 159 S.E.2d 327 (1968); *State v. Peele*, 274 N.C. 106, 161 S.E.2d 568 (1968).

Where each defendant assigns as error the denial of his motion for judgment of nonsuit, but this assignment of error by each defendant is not brought forward and discussed in their joint brief, it is deemed to be abandoned by each defendant. *State v. Covington*, 267 N.C. 292, 148 S.E.2d 138 (1966).

Plaintiffs' assignments of error relating to certain exceptions to the admission and exclusion of evidence were deemed abandoned, the brief filed by the plaintiffs containing no argument or citation of authority in support of these exceptions or any other reference thereto. *Pendergrass v. Massengill*, 269 N.C. 364, 152 S.E.2d 657 (1967).

Where defendants not only assign as error the several conclusions of law upon which the judgment below is founded, and the judgment, but except to and assign as error the findings of fact made by the court upon which the conclusions of law are based, yet in their brief they challenge only the correctness of the conclusions of law and the judgment, under this rule the exception to the findings of fact will be taken as abandoned, leaving for consideration the challenge to the conclusions of law and judgment. *Amick v. Coble*, 222 N.C. 484, 23 S.E.2d 854 (1943).

Where defendants have not argued in their brief their assignment of error to the failure of the court below to sustain their motion for judgment as of nonsuit interposed at the close of all the evidence, this assignment of error will be taken as abandoned under this rule. *Textile Motor Freight v. DuBose*, 260 N.C. 497, 133 S.E.2d 129 (1963).

Where the sole reference in its brief to any exception or assignment of error merely discussed the failure of the court to grant its motion for judgment of nonsuit, the appellant's brief as to the questions discussed in it did not conform with this rule. *Cudworth v. Reserve Life Ins. Co.*, 243 N.C. 584, 91 S.E.2d 580 (1956).

Where appellant does not bring forward into his brief or cite therein any authorities in support of his assignment of error with reference to the overruling of his motion to set aside the verdict as being against the greater weight of the evidence and, on that ground, to grant a new trial, such assignment is deemed abandoned. *Martin v. Underhill*, 265 N.C. 669, 144 S.E.2d 872 (1965).

Exceptions and assignments of error not discussed in the brief are deemed abandoned. *State v. Kirby*, 276 N.C. 123, 171 S.E.2d 416 (1970).

Assignments of error not discussed in a defendant's brief are deemed abandoned. *State v. Baldwin*, 276 N.C. 690, 174 S.E.2d 526 (1970).

Where briefs do not contain the exceptions and assignments of error, properly numbered, with references to the printed record, they do not conform to the rules. It is impossible to determine just what exceptions or assignments of error are referred to. *State v. Newton*, 207 N.C. 323, 177 S.E. 184 (1934).

Defendants brief should designate the assignments of error discussed by number with reference to the printed pages of the transcript, and authorities relied on should be classified under each of the assignments. *State v. Abernethy*, 220 N.C. 226, 17 S.E.2d 25 (1941).

Effect of Failure to Set Forth Exceptions and Assignments of Error.—The exceptions and assignments of error were not set forth in defendant appellant's brief. This is tantamount to the admission that the evidence was sufficient to be submitted to the jury. *State v. Walls*, 211 N.C. 487, 191 S.E. 232 (1937).

In Capital Case.—Although exceptions, in support of which no reason or argument is stated or authority cited, will be taken as abandoned in accordance with the provisions of this rule, nevertheless in the case of a capital felony, the Supreme Court will examine the matters to which those exceptions relate in its search for prejudicial error. *State v. Roman*, 235 N.C. 627, 70 S.E.2d 857 (1952).

Exception Too General. — An exception simply to the general failure of the judge to state in a plain and correct manner the evidence and declare and explain the law arising thereon is too general and cannot be sustained. *Ellis v. Wellons*, 224 N.C. 269, 29 S.E.2d 884 (1944).

Question Discussed in Oral Argument.—A question on oral argument, but not embraced in the assignments of error referred to in the brief, will not be considered. *Mitchem v. Mitchem*, 169 N.C. 48, 85 S.E. 146 (1915).

Citation of Cases. — The grouping of cases cited in a brief does not authorize the use of the names of such cases throughout the brief without giving the citation of such cases. *Weaver v. Morgan*, 232 N.C. 642, 61 S.E.2d 916 (1950).

Failure to Furnish Appellee with Copy of Brief.—The appellee may not successfully move in the Supreme Court to have

the case dismissed for the failure of the appellant to furnish him a copy of his briefs when the brief was duly filed with the clerk under the rule, and he could have obtained one in the time prescribed by applying to the clerk, who is not under duty to either notify him or supply him a copy except at his request. *Turnage v. Dunn*, 196 N.C. 105, 144 S.E. 521 (1928).

Where the defendant did not assign the failure to allow his motion of nonsuit as error, on appeal the Supreme Court could not consider any of the questions which were raised by the motion for nonsuit. *State v. Overman*, 257 N.C. 464, 125 S.E.2d 920 (1962).

When Appellant Must Discuss Appellees' Exceptions.—On an appeal from an order of a trial judge setting aside a verdict of the jury in favor of the plaintiff because of error committed against the defendant, the brief of appellant must refer to exceptions taken by defendant. *Powers v. City of Wilmington*, 177 N.C. 361, 99 S.E. 102 (1919).

Rule not complied with in *State v. Stubbs*, 266 N.C. 274, 145 S.E.2d 896 (1966).

Applied in *Merrimon v. Lyman*, 124 N.C. 434, 32 S.E. 732 (1899); *Smith v. Atlantic Coast Line R.R.*, 142 N.C. 21, 54 S.E. 786 (1906); *Liles v. Lumber Co.*, 142 N.C. 39, 54 S.E. 795 (1906); *Johnson City S. Ry. v. South & W.R.R.*, 148 N.C. 59, 61 S.E. 683 (1908); *Rushing v. Seaboard Air Line Ry.*, 149 N.C. 158, 62 S.E. 890 (1908); *White v. Lane*, 153 N.C. 14, 68 S.E. 895 (1910); *Edwards v. Price*, 162 N.C. 243, 78 S.E. 145 (1913); *State v. Smith*, 164 N.C. 475, 79 S.E. 979 (1913); *In re Parker*, 165 N.C. 130, 80 S.E. 1057 (1914); *Lloyd v. Southern Ry.*, 166 N.C. 24, 81 S.E. 1003 (1914); *Lynch v. Rosemary Mfg. Co.*, 167 N.C. 98, 83 S.E. 6 (1914); *Ingle v. Southern Ry.*, 167 N.C. 636, 83 S.E. 744 (1914); *Winborne Guano Co. v. Plymouth Mercantile Co.*, 168 N.C. 223, 84 S.E. 272 (1915); *Starnes v. Raleigh, C. & S. Ry.*, 170 N.C. 222, 87 S.E. 43 (1915); *Estes v. Rash*, 170 N.C. 341, 87 S.E. 109 (1915); *Campbell v. Sigmon*, 170 N.C. 348, 87 S.E. 116 (1916); *Lovelace v. Atlantic Coast Line R.R.*, 172 N.C. 12, 89 S.E. 797 (1916); *State v. Bryson*, 173 N.C. 803, 92 S.E. 698 (1917); *Gray v. Cartwright*, 174 N.C. 49, 93 S.E. 432 (1917); *Borden v. Carolina Power & Light Co.*, 174 N.C. 72, 93 S.E. 442 (1917); *State v. Coble*, 177 N.C. 588, 99 S.E. 339 (1919); *Allen v. Town of Reidsville*, 178 N.C. 513, 101 S.E. 267 (1919); *Hill v. Aman*, 181 N.C. 483, 106 S.E. 214 (1921); *Baker v. Winslow*, 184 N.C. 1, 113 S.E. 570 (1922); *Harrison v. Norfolk S.R.R.*, 184 N.C. 86,

113 S.E. 678 (1922); *Wooley v. Bruton*, 184 N.C. 438, 114 S.E. 628 (1922); *Bunn v. Dunn*, 185 N.C. 108, 116 S.E. 172 (1923); *Avery County Bank v. Smith*, 186 N.C. 635, 120 S.E. 215 (1923); *In re Will of Westfeldt*, 188 N.C. 702, 125 S.E. 531 (1924); *State v. Hopkins*, 217 N.C. 324, 7 S.E.2d 566 (1940); *Sills v. Morgan*, 217 N.C. 662, 9 S.E.2d 518 (1940); *State v. McMahan*, 224 N.C. 476, 31 S.E.2d 357 (1944); *Bailey v. Inman*, 224 N.C. 571, 31 S.E.2d 769 (1944); *Whitehurst v. FCX Fruit & Vegetable Serv., Inc.*, 224 N.C. 628, 32 S.E.2d 34 (1944); *State v. Biggs*, 224 N.C. 722, 32 S.E.2d 352 (1944); *State v. Harrell*, 226 N.C. 743, 40 S.E.2d 205 (1946); *State v. McKnight*, 226 N.C. 766, 40 S.E.2d 419 (1946); *State v. Anderson*, 228 N.C. 720, 47 S.E.2d 1 (1948); *State v. Shackelford*, 232 N.C. 299, 59 S.E.2d 825 (1950); *State v. Carter*, 233 N.C. 581, 65 S.E.2d 9 (1951); *Commercial Solvents, Inc. v. Johnson*, 235 N.C. 237, 69 S.E.2d 716 (1952); *Dillingham v. Klizerman*, 235 N.C. 298, 69 S.E.2d 500 (1952); *In re Will of McGowan*, 235 N.C. 404, 70 S.E.2d 189 (1952); *Thompson v. Thompson*, 235 N.C. 416, 70 S.E.2d 495 (1952); *Williams v. Robertson*, 235 N.C. 478, 70 S.E.2d 692 (1952); *State v. Floyd*, 241 N.C. 79, 84 S.E.2d 299 (1954); *State v. Willard*, 241 N.C. 259, 84 S.E.2d 899 (1954); *Commercial Credit Corp. v. Robeson Motors, Inc.*, 243 N.C. 326, 90 S.E.2d 886 (1956); *State v. Garner*, 244 N.C. 79, 92 S.E.2d 445 (1956); *State v. Hairr*, 244 N.C. 506, 94 S.E.2d 472 (1956); *Paul v. Neece*, 244 N.C. 565, 94 S.E.2d 596 (1956); *Lieb v. Mayer*, 244 N.C. 613, 94 S.E.2d 658 (1956); *Watson v. General Accident Fire & Life Assurance Corp.*, 244 N.C. 696, 94 S.E.2d 839 (1956); *State v. Cauley*, 244 N.C. 701, 94 S.E.2d 915 (1956); *Robinson v. Thomas*, 244 N.C. 732, 94 S.E.2d 911 (1956); *State v. Adams*, 245 N.C. 344, 95 S.E.2d 902 (1957); *Beasley v. McLamb*, 247 N.C. 179, 100 S.E.2d 387 (1957); *Speights v. Carraway*, 247 N.C. 220, 100 S.E.2d 339 (1957); *State v. Buntton*, 247 N.C. 510, 101 S.E.2d 454 (1958); *State v. Knight*, 247 N.C. 754, 102 S.E.2d 259 (1958); *Beaty v. International Ass'n of Heat & Frost Insulators*, 248 N.C. 170, 102 S.E.2d 763 (1958); *State v. Lee*, 248 N.C. 327, 103 S.E.2d 295 (1958); *Taylor v. Hunt*, 248 N.C. 330, 103 S.E.2d 287 (1958); *Coffey v. Greer*, 249 N.C. 256, 106 S.E.2d 209 (1958); *Wall v. Trogon*, 249 N.C. 747, 107 S.E.2d 757 (1959); *State v. Perry*, 250 N.C. 119, 108 S.E.2d 447 (1959); *DeBruhl v. L. Harvey & Son Co.*, 250 N.C. 161, 108 S.E.2d 469 (1959); *State v. Corl*, 250 N.C. 258, 108 S.E.2d 615 (1959); *State v. Corl*, 250 N.C. 262, 108 S.E.2d 613 (1959); *Dar-*

roch v. Johnson, 250 N.C. 307, 108 S.E.2d 589 (1959); *Millas v. Coward*, 251 N.C. 88, 110 S.E.2d 606 (1959); *State v. Avent*, 253 N.C. 580, 118 S.E.2d 47 (1961); *Harris & Harris Constr. Co. v. Crain & Denbo, Inc.*, 256 N.C. 110, 123 S.E.2d 590 (1962); *Johnson v. Bass*, 256 N.C. 716, 125 S.E.2d 19 (1962); *Seawell v. Brame*, 258 N.C. 666, 129 S.E.2d 283 (1963); *State v. Cox*, 262 N.C. 609, 138 S.E.2d 224 (1964); *State v. Brown*, 263 N.C. 786, 140 S.E.2d 413 (1965); *State v. Hamilton*, 264 N.C. 277, 141 S.E.2d 506 (1965); *State v. Mohrmann*, 265 N.C. 594, 144 S.E.2d 645 (1965); *Dawson v. Carolina Power & Light Co.*, 265 N.C. 691, 144 S.E.2d 831 (1965); *Morgan v. Great Atl. & Pac. Tea Co.*, 266 N.C. 221, 145 S.E.2d 877 (1966); *State v. Sellers*, 266 N.C. 734, 147 S.E.2d 225 (1966); *State v. Smith*, 267 N.C. 659, 148 S.E.2d 573 (1966); *State v. Spears*, 268 N.C. 303, 150 S.E.2d 499 (1966); *State v. Barber*, 270 N.C. 222, 154 S.E.2d 104 (1967); *State v. Midyette*, 270 N.C. 229, 154 S.E.2d 66 (1967); *State v. Little*, 270 N.C. 234, 154 S.E.2d 61 (1967); *State v. Rose*, 270 N.C. 406, 154 S.E.2d 492 (1967); *Potts v. Howser*, 274 N.C. 49, 161 S.E.2d 737 (1968); *Sykes v. Clayton*, 274 N.C. 398, 163 S.E.2d 775 (1968); *State v. Ray*, 274 N.C. 556, 164 S.E.2d 457 (1968); *Wiles v. Mullinax*, 275 N.C. 473, 168 S.E.2d 366 (1969); *State v. Henderson*, 276 N.C. 430, 173 S.E.2d 291 (1970).

Quoted in Drumwright v. Wood, 266 N.C. 198, 146 S.E.2d 1 (1966).

Stated in Cooperative Warehouse v. Lumberton Tobacco Bd. of Trade, 242 N.C. 123, 87 S.E.2d 25 (1955).

Cited in State v. Hendricks, 207 N.C. 873, 178 S.E. 557 (1935); *State v. Kinyon*, 210 N.C. 294, 186 S.E. 368 (1936); *State v. Murray*, 216 N.C. 681, 6 S.E.2d 513 (1940); *Caldwell v. Southern Ry.*, 218 N.C. 63, 10 S.E.2d 680 (1940); *State v. Ward*, 222 N.C. 316, 22 S.E.2d 922 (194); *Gordon v. Calhoun Motors, Inc.*, 222 N.C. 398, 23 S.E.2d 325 (1942); *State v. Reddick*, 222 N.C. 520, 23 S.E.2d 909 (1943); *Curlee v. Scales*, 223 N.C. 788, 28 S.E.2d 576 (1944); *State v. Murdock*, 225 N.C. 224, 34 S.E.2d 69 (1945); *State v. Friddle*, 225 N.C. 240, 34 S.E.2d 5 (1945); *State v. Gordon*, 225 N.C. 241, 34 S.E.2d 414 (1945); *State v. Reid*, 230 N.C. 561, 53 S.E.2d 849 (1949); *State v. Herbin*, 232 N.C. 58, 59 S.E.2d 635 (1950); *State v. Lamm*, 232 N.C. 402, 61 S.E.2d 188 (1950); *State v. Liles*, 232 N.C. 622, 61 S.E.2d 603 (1950); *State v. Minton*, 234 N.C. 716, 68 S.E.2d 844 (1951); *State v. Birchfield*, 235 N.C. 410, 70 S.E.2d 5 (1952); *State v. Williams*, 235 N.C. 429, 70 S.E.2d 1 (1952); *Chambers v.*

Chambers, 235 N.C. 749, 71 S.E.2d 57 (1952); State v. Gordon, 241 N.C. 356, 85 S.E.2d 322 (1955); State v. McNeely, 244 N.C. 737, 94 S.E.2d 853 (1956); Conrad v. Conrad, 252 N.C. 412, 113 S.E.2d 812 (1960); Harvel's Inc. v. Eggleston, 268 N.C. 388, 150 S.E.2d 786 (1966).

29. Appellee's Brief

Within the time required by the rules of this Court, the appellee shall file with the clerk a copy of his brief for mimeographing, and the same shall be noted by the clerk on his docket and a copy furnished by the clerk, on application, to counsel for appellant. It is not required that appellee's brief shall contain a statement of the case. On failure of the appellee to file his brief by the time required, the cause will be heard and determined without argument by the appellee unless for good cause shown the Court shall give appellee further time to file his brief.

30. Arguments

(1) The counsel for the appellant shall be entitled to open and conclude the argument.

(2) Counsel for appellant may be heard ten minutes for statement of case and thirty minutes in argument.

(3) Counsel for appellee may be heard thirty minutes.

(4) The time for argument may be extended by the Court in a case requiring such extension, but application for extension must be made before the argument begins. The Court, however, may direct the argument of such points as it may see fit outside of the time limited.

(5) Any number of counsel may be heard on either side within the limit of the time above specified; but if several counsel shall be heard, each must confine himself to a part or parts of the subject matter involved in the exceptions not discussed by his associate counsel, unless directed otherwise by the Court, so as to avoid tedious and useless repetition.

31. Rearguments

The Court will, of its own motion, direct a reargument before deciding any case, if in its judgment it is desirable.

Court May Order Reargument. — It is the duty of parties to see that their causes are fully argued in the Supreme Court, and where this has not been—especially where the record is voluminous and assignments of error indefinite—the Court will require it to be reargued. *Lenoir v. Valley River Mining Co.*, 104 N.C. 490, 10 S.E. 525 (1889).

Petition Need Not Be Filed.—Where a new trial is granted without passing up-

on certain exceptions, and, upon a rehearing of the exceptions upon which new trial was granted, is reversed, the Supreme Court may order a reargument of the exceptions not passed upon, without a petition for the same being filed. *Fleming v. Southern Ry.*, 132 N.C. 714, 44 S.E. 551 (1903).

32. Agreements of Counsel

The Court will not recognize any agreement of counsel in any case unless the same shall appear in the record, or in writing, filed in the cause in this Court.

Verbal Agreements Not Considered When Denied.—The Supreme Court will not consider appellant's alleged verbal agreement between the parties when such is denied. *Standard Mirror Co. v. Philadelphia Cas. Co.*, 157 N.C. 28, 72 S.E. 826 (1911); *Brewer v. Mineola Mfg. Co.*, 161

N.C. 211, 76 S.E. 237 (1912); *McNeil v. Virginia-Carolina R.R.*, 173 N.C. 729, 92 S.E. 484 (1917).

When it appears in the Supreme Court that appellant has not served his case on appeal in time, no agreement for further extension thereof will be considered, un-

less it is in writing or appears by an entry on the record. *Standard Mirror Co. v. Philadelphia Cas. Co.*, 157 N.C. 28, 72 S.E. 826 (1911); *State v. Black*, 162 N.C. 637, 78 S.E. 210 (1913).

Applied in *Russos v. Bailey*, 228 N.C. 783, 47 S.E.2d 22 (1948).

33. Appearances

An attorney shall not be recognized as appearing in any case unless he be entered as counsel of record in the case. Upon his request, the clerk shall enter the name of such attorney, or he may enter it himself, thereby making him counsel of record for the party he may designate therein. Such appearance of counsel shall be deemed to be general in the case, unless a different appearance be indicated. Counsel of record are not permitted to withdraw from a case, except by leave of the Court.

34. Certiorari

(1) When Applied for.—Generally, the writ of certiorari, as a substitute for an appeal, must be applied for at the term of this Court to which the appeal ought to have been taken, or, if no appeal lay, then before or to the term of this Court next after the judgment complained of was entered in the Superior Court. If the writ shall be applied for after that term, sufficient cause for the delay must be shown.

(2) How Applied for.—The writs of certiorari and supersedeas shall be granted only upon petition, specifying the grounds of application therefor, except when a diminution of the record shall be suggested and it appears upon the face of the record that it is manifestly defective, in which case the writ of certiorari may be allowed, upon motion in writing. In all other cases the adverse party may answer the petition. The petition and answer must be verified, and the application shall be heard upon the petition, answer, affidavit, and such other evidence as may be pertinent.

(3) Notice of.—No such petition or motion in the application shall be heard unless the petitioner shall have given the adverse party ten days' notice, in writing, of the same; but the Court may, for just cause shown, shorten the time for such notice.

Cross Reference.—As to certiorari generally, see § 1-269 and note thereto.

Rule Strictly Applied.—Failure to comply strictly with the regulations contained in this rule will result in a dismissal. In re *McCoy*, 233 F. Supp. 409 (E.D.N.C. 1964).

When Certiorari Should Be Applied for.—Where the appellant can show good and sufficient cause why his case on appeal had not been docketed in the Supreme Court in the time required by the rules, or that he was not therein at fault, he should file a transcript of the record proper and move for a certiorari for the statement of the case, which may be done at any time during the term before appellee moves to dismiss it. *McNeil v. Virginia-Carolina R.R.*, 173 N.C. 729, 92 S.E. 484 (1917); *Rose v. Rocky Mount*, 184 N.C. 609, 113 S.E. 506 (1922).

Not a Matter of Right.—Where the record of a case on appeal is not docketed in the Supreme Court at the time required

by Rule 5, it will be dismissed, but the Court may, in its discretion and not as a matter of right of the appellant, grant further time for the filing of the record, if the appellant files the record proper in apt time and thereupon moves for a certiorari, showing that the delay was not attributable to himself. *State ex rel Mills v. National Sur. Co.*, 192 N.C. 52, 133 S.E. 172 (1926); *Pruitt v. Wood*, 199 N.C. 788, 156 S.E. 126 (1930).

When he has depended solely upon a void order of the trial judge extending the time for the service of his case, which is excepted to, the case will be dismissed. *State v. Crowder*, 195 N.C. 335, 142 S.E. 222 (1928).

Legal Excuse Decided by Supreme Court.—Whether the appellant has legal excuse in not docketing his case on appeal in time for it to be regularly heard at the call of the district to which it belongs is a matter for the Supreme Court to determine upon his docketing the rec-

ord proper and moving for a certiorari under the rule. *State v. Johnson*, 183 N.C. 730 110 S.E. 782 (1922).

Motion Too Late after Argument. — Where the plaintiff's motion for a certiorari was disallowed at a former term of the Supreme Court without prejudice, for the purpose of allowing him to renew his motion after he had applied to the trial judge to correct the case, the plaintiff should again move the Court for a writ before the call of the district to which the case belonged, and it comes too late after argument of the case. *Todd v. Mackie*, 160 N.C. 352, 76 S.E. 245 (1912).

Motion Denied after Appeal Dismissed. — A motion for a certiorari to bring up the case on appeal will be denied if made after the appellee has had it docketed and dismissed under Rule 17. *Cox v. Kinston Carolina R.R. & Lumber Co.*, 177 N.C. 227, 98 S.E. 704 (1919).

Application for Certiorari. — Where the appellant in a criminal action has failed to have his case docketed in the time required by the Rules of Practice in the Supreme Court, in order to preserve his right to appeal it is required that he file an application for a certiorari, addressed to the sound discretion of the Supreme Court, and show a good and sufficient reason for granting his motion therefor, and where this has not been done the appeal will be dismissed upon motion of the State. *State v. Harris*, 199 N.C. 377, 154 S.E. 628 (1930).

Appellant Must Docket All Available Record. — When the appeal is not docketed at or before the time prescribed in Rule 5, the appellant must docket all of the record proper, or so much thereof as he can obtain, with an affidavit, as to why the entire record cannot be docketed and move at that time for a certiorari. If he fails to do so, the appellee has the right to docket the certificate prescribed by Rule 17 and have the appeal dismissed. *Caudle v. Morris*, 158 N.C. 594, 74 S.E. 98 (1912); *State v. Johnson*, 183 N.C. 730, 110 S.E. 782 (1922); *Hardy v. Heath*, 188 N.C. 271, 124 S.E. 564 (1924).

Appellant's motion for a writ of certiorari will be denied where the petition is not verified and no transcript of the record has been filed nor any good reason shown for failure to file it. *Critz v. Sprager*, 121 N.C. 283, 28 S.E. 365 (1897); *Rothchild v. McNichol*, 121 N.C. 284, 28 S.E. 364 (1897).

In order to support a motion for certiorari it is required that appellant file transcript of the record proper and give appellee notice of the motion, and appel-

lee's transcript of record filed on motion to docket and dismiss, under Rule 17, cannot avail the appellant on his motion for certiorari. *Hinnant v. American Fire & Marine Ins. Co.*, 204 N.C. 306, 168 S.E. 199 (1933).

Filing of Original Papers Insufficient. — A transcript of the record proper should be filed by appellant in the Supreme Court to entitle him to move for a certiorari; and the filing of the original papers, which should remain in the office of the superior court, is insufficient. *Lindsey v. Supreme Lodge of Knights of Honor*, 172 N.C. 818, 90 S.E. 1013 (1916).

Effect of Agreement for Extension of Time. — Where the parties have agreed upon such extension of time for the service of their respective cases on appeal that the delay will cause the docketing of the case too late to come within the rule, the appellant having used his full time may not successfully move in the Supreme Court for a certiorari upon the ground that the delay was caused by a loss of the papers in it, for which he was not responsible, without proof sufficient to overcome evidence in denial of the allegation. *Baker v. Hare*, 192 N.C. 788, 136 S.E. 113 (1926).

Question of Laches May Be Heard. — Where the appellant asserts that he is not in default in docketing his appeal in the time required by the rule, he may apply for a certiorari to bring up the transcript of the case, or the omitted part, and thus only have the question of his laches therein passed upon. *Stone v. Ledbetter*, 191 N.C. 777, 133 S.E. 162 (1926).

When Case on Appeal Not Prepared. — Where a case and counter-case are served within the time as extended by agreement, but neither is accepted, appellant must immediately request a settlement, file the record proper, and sue out certiorari; otherwise appellee may move to docket and dismiss under Rule 17. *Waynesville Transp. Co. v. Waynesville Lumber Co.*, 168 N.C. 60, 84 S.E. 54 (1915); *Washam & Patterson Motor Co. v. Reep*, 186 N.C. 509, 119 S.E. 821 (1923).

Certiorari Denied When Case Unsettled by Agreement. — Where the parties to an action have agreed, or the judge at their request has allowed an extension of time for service of case and counter-case, etc., that will prevent its being docketed in the time prescribed by Rule 5, and consequently no case has been settled by the trial judge, appellant's motion in the Supreme Court for a writ of certiorari will be denied. *Waller v. Dudley*, 193 N.C. 354, 137 S.E. 149 (1927).

When Appellee Prevents Docketing of Appeal. — Where the appellant is prevented from docketing his appeal within the time prescribed by Rule 5, in consequence of the conduct of the appellee or his counsel, he is entitled to the writ of certiorari to bring up the case. *Briggs v. Jervis*, 98 N.C. 454, 4 S.E. 631 (1887).

Appeal by Person without Counsel Treated as Petition for Certiorari.—Where plaintiff, appearing in propria persona because of an asserted inability to employ counsel, fails to comply with the rules of court governing appeals, the Supreme Court, in the exercise of its supervisory jurisdiction, may treat the purported appeal as a petition for certiorari. *Huffman v. Douglass Aircraft Co.*, 260 N.C. 308, 132 S.E.2d 614 (1963).

Failure to Pay Clerk's Fees.—The failure of the clerk below to send up the transcript after the case on appeal had been filed in his office will not excuse appellant's failure to have the transcript or case on appeal filed, where there is no alle-

gation that the appellant had tendered the fees for such transcript and was otherwise free from laches. *Critz v. Sparger*, 121 N.C. 283, 28 S.E. 365 (1897).

Extent of Waiver by Consent. — The parties to an appeal, without the consent of the Court, cannot waive the rule of the Supreme Court requiring that a transcript of the record proper, or all thereof that may be had, shall be filed therein as the basis for the motion for a certiorari; but they may, by written agreement, consent that the appeal may be docketed at the next ensuing term of the Supreme Court. *Murphy v. Carolina Elec. Co.*, 174 N.C. 782, 93 S.E. 456 (1917).

Applied in *Causey v. Snow*, 116 N.C. 497, 21 S.E. 179 (1895); *Brown v. House*, 119 N.C. 622, 26 S.E. 160 (1896); *Burrell v. Hughes*, 120 N.C. 277, 26 S.E. 782 (1897); *Rothchild v. McNichol*, 121 N.C. 284, 28 S.E. 364 (1897); *Parker v. Southern Ry.*, 121 N.C. 501, 28 S.E. 347 (1897); *State v. Rogers*, 275 N.C. 411, 168 S.E.2d 345 (1969).

35. Additional Issues

If, pending the consideration of an appeal, the Supreme Court shall consider the trial of one or more issues of fact necessary to a proper decision of the case upon its merits, such issues shall be made up under the direction of the Court and certified to the Superior Court for trial, and the case will be retained for that purpose.

36. Motions

All motions made to the Court must be reduced to writing, and shall contain a brief statement of the facts on which they are founded, and the purpose of the same. Such motions, not leading to debate nor followed by voluminous evidence, may be made at the opening of the session of the Court.

Only Motions in Writing Entertained. — The Supreme Court will not entertain any motion, unless reduced to writing. *McCoy v. Lassiter*, 94 N.C. 131 (1886); *Hoyle*

v. Bagby, 253 N.C. 778, 117 S.E.2d 760 (1961).

Applied in *Oliver v. Williams*, 266 N.C. 601, 146 S.E.2d 648 (1966).

37. Abatement and Revivor

Whenever, pending an appeal to this Court, either party shall die, the proper representative in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in, and, on motion, be admitted to become parties to the action, and thereupon the appeal shall be heard and determined as in other causes; and if such representatives shall not so voluntarily become parties, then the opposing party may suggest the death upon the record, and thereupon, on motion, obtain an order that, unless such representatives shall become parties within the first five days of the ensuing term, the party moving for such order shall be entitled to have the appeal dismissed; or, if the party moving shall be the appellant, he shall be entitled to have the appeal heard and determined according to the course of the Court: Provided, such order shall be served upon the opposing party.

When the death of a party is suggested, and the proper representatives of the deceased fail to appear by the fifth day of the term next succeeding such suggestion, and no action shall be taken by the opposing party within the time to compel their appearance, the appeal shall abate, unless otherwise ordered.

Death of Party Pending Appeal.—Where a party dies pending appeal, his personal representative will be made a party by order of the Court. *First & Citizens Nat'l Bank v. Toxey*, 210 N.C. 470, 187 S.E. 553 (1936).

When a party dies pending appeal, his administratrix will be substituted as a party upon motion. *Peterson v. McLamb*, 221 N.C. 538, 19 S.E.2d 488 (1942).

Applied in *Simmons v. Rogers*, 247 N.C. 340, 100 S.E.2d 849 (1957).

38. Certification of Decisions

The clerk shall, on the first Monday in each month, transmit, by some safe hand, or by mail to the clerks of the Superior Courts, certificates of the decisions of the Supreme Court which shall have been on file ten days, in cases sent from said court. General Statutes, § 7-16. But the Court in its discretion may order an opinion certified down at an earlier day. Upon final adjournment of the Court, the clerk shall at once certify to the Superior Courts all of the decisions not theretofore certified.

The clerk of this Court shall, and he is hereby directed, to transmit to the proper clerks of the Superior Courts, certificates of the decisions of the Supreme Court on the second Monday after the written opinions of the Court are filed in his office, unless otherwise directed, as provided in Rule 38 of the Rules of Practice in the Supreme Court.

39. Judgment and Minute Dockets

The judgment docket of this Court shall contain an alphabetical index of the names of the parties in favor of whom and against whom any judgment for costs or judgment interlocutory or upon the merits is entered. On this docket the clerk of the Court will enter a brief memorandum of every final judgment affecting the right to real property, and of every judgment requiring, in whole or in part, the payment of money, stating the names of the parties, the term at which such judgment was entered, its number on the docket of the Court; and when it shall appear from the return on the execution, or from an order for entry of satisfaction by this Court, that the judgment has been satisfied, in whole or in part, the clerk, at the request of any one interested in such entry, and on the payment of the lawful fee, shall make a memorandum of such satisfaction, whether in whole or in part, and refer briefly to the evidence of it.

The clerk shall keep a Permanent Minute-Book, containing a brief summary of the proceedings of this Court in each appeal disposed of.

Cited in *Corporation Comm'n v. Railroad*, 137 N.C. 1, 49 S.E. 191 (1904).

40. Clerk and Commissioners

The clerk and every commissioner of this Court who, by virtue or under color of any order, judgment, or decree of the Supreme Court in any action or matter pending therein, has received or shall receive any money or security for money, to be kept or invested for the benefit of any party to such action or matter, or of any other person, shall, at the term of said Court held next after the first day of January in each year, report to the Court a statement of said fund, setting forth the title and number of the action or matter, the term of the Court at which the order or orders under which the clerk or such commissioner professes to act was made, the amount and character of the investment, and the security for same, and his opinion as to the sufficiency of such security. In every subsequent report he shall

state the condition of the fund and any change made in the amount or character of the investment, and every payment made to any person entitled thereto.

The reports required by the preceding paragraph shall be examined by the Court or some member thereof, and their or his approval indorsed shall be recorded in a well-bound book, kept for the purpose, in the office, of the clerk of the Supreme Court, entitled "Record of Funds," and the cost of recording the same shall be allowed by the Court and paid out of the fund. The report shall be filed among the papers of the action or matter to which the fund belongs.

41. Repealed.

Editor's Note.—The former rule pertained to the librarian. For present statutory provisions as to library and librarian,

see § 7A-13. For rules and regulations governing use of library, see Appendix X.

42. Court's Opinions

After the Court has decided a cause, the judge assigned to write it shall hand the opinion, when written, to the clerk, who shall cause seven typewritten copies to be at once made and a copy sent in a sealed envelope to each member of the Court, to the end, that the same may be carefully examined, and the bearing of the authority cited may be considered prior to the day when the opinion shall be finally offered for adoption by the Court and ordered to be filed.

43. Executions

(1) **Teste of Executions.** When an appeal shall be taken after the commencement of a term of this Court, the judgment and teste of the execution shall have effect from the time of the filing of the appeal.

(2) **Issuing and Return of.** Executions issuing from this Court may be directed to the proper officers of any county in the State. At the request of a party in whose favor execution is to be issued, it may be made returnable on any specified day after the commencement of the term of this Court next ensuing its teste. In the absence of such request, the clerk shall, within thirty days after the certificate of opinion is sent down, issue such execution to the county from which the cause came, making it returnable on the first day of the next ensuing term. The execution may, when the party in whose favor judgment is rendered shall so direct, be made returnable to the term of the Superior Court of said county held next after the date of its issue, and thereafter successive executions will only be issued from said Superior Court, and when satisfied, the fact shall be certified to this Court, to the end that an entry to this effect be made here.

Executions for the costs of this Court, adjudged against the losing party to appeals, may be issued after the determination of the appeal, returnable to a subsequent day of the term; or they may be issued after the end of the term, returnable, on a day named, at the next succeeding term of this Court.

The officer to whom said executions are directed shall be amenable to the penalties prescribed by law for failure to make due and proper return thereof.

Cross References.—As to execution generally, see § 1-302 et seq. As to judgments on appeal, see § 1-297. As to stay of execution, see § 1-293 et seq.

Execution a Lien from Its Teste. — An execution issuing from the Supreme

Court, upon a judgment obtained therein, to a county in which the defendant has land, is a lien upon the land from its teste. *Rhyne v. McKee*, 73 N.C. 259 (1875).

Cited in *Corporation Comm'n v. Railroad*, 137 N.C. 1, 49 S.E. 191 (1904).

44. Petition to Rehear

(1) **When Filed.** Petitions to rehear must be filed within forty days after the filing of the opinion in the case. No communication with the Court, or any Justice thereof, in regard to any such petition, will be permitted under any circum-

stances. No oral argument or other presentation of the cause to the Court, or any Justice thereof, by either party, will be allowed, unless on special request the Court shall so order.

Rule Mandatory.—The requirement that a petition for a rehearing be filed within forty days after the filing of the opinion in the case is mandatory upon all litigants alike, and will be rigidly enforced. *Cooper v. Board of Comm'rs*, 184 N.C. 615, 113 S.E. 569 (1922).

This rule prescribes the procedure for the correction of errors by the Supreme Court. *Nowell v. Neal*, 249 N.C. 516, 107 S.E.2d 107 (1959).

Time of Filing Affidavit in Support of Motion.—Where the Supreme Court, on appeal, has allowed a motion for a new trial for newly discovered evidence after having fixed a time in which the parties may file their affidavit in support of the motion and per contra, the Court will not thereafter allow a motion retaining the

case on its docket for the purpose of correcting the amount of the judgment. *Moore v. Tidwell*, 194 N.C. 186, 138 S.E. 541 (1927).

When Time Begins to Run.—The time begins to run against a petition to rehear in the Supreme Court from the time the opinion was filed in the office of the clerk of that Court. *McGeorge v. Nicola*, 173 N.C. 733, 92 S.E. 610 (1917).

Distinction Between Filing and Docketing.—The petition is said to be filed when it is received by the clerk, and this must be done within forty days after the filing of the opinion; it is docketed when the clerk enters it upon the records at the order of the Justice, who grants the rehearing. *Bird v. Gilliam*, 123 N.C. 63, 31 S.E. 267 (1898).

(2) What to Contain. The petition must assign the alleged error of law complained of, or the matter overlooked, or the newly discovered evidence; and allege that the judgment complained of has been performed or secured. Such petition shall be accompanied with the certificate of at least two members of the bar of this Court, who have no interest in the subject matter and have not been of counsel for either party to the suit, and each of whom shall have been at least five years a member of the bar of this Court, that they have carefully examined the case and the law bearing thereon and the authorities cited in the opinion, and they shall summarize succinctly in such certificate the points in which they deem the opinion erroneous.

Failure to File Certificate.—Where the applicant has failed to file the certificates of two disinterested members of the bar, indorsed by two members of the Supreme Court, the application will not be considered, except in certain instances where the

Supreme Court may reconsider the case ex mero motu. *Teeter v. Southern Express Co.*, 172 N.C. 620, 90 S.E. 927 (1916).

Cited in *In re Will of Franks*, 231 N.C. 736, 57 S.E.2d 315 (1950).

(3) Two Copies to Be Filed, How Endorsed. The petitioner shall endorse upon the petition, of which he shall file two copies, the names of the two Justices, neither of whom dissented from the opinion, to whom the petition shall be referred by the clerk, and it shall not be docketed for rehearing unless both of said Justices endorse thereon that it is a proper case to be reheard: Provided, however, that when there have been three dissenting Justices, it shall be sufficient for the petitioner to file only one copy of the petition and designate only one Justice, and his approval in such case shall be sufficient to order the petition docketed.

The clerk shall, upon the receipt of a petition to rehear, immediately deliver a copy to each of the Justices to whom it is to be referred, unless the petition is received during a vacation of the Court, in which event it shall be delivered to the Justice designated by the petitioner on the first day of the next succeeding term of Court.

(4) Justices to Act in Thirty Days. The clerk shall enter upon the rehearing docket and upon the petition the date when the petition is filed in the clerk's office, the names of the Justices to whom the petitioner has requested that the petition be referred, and also the date when the petition is delivered to each of the Justices. The Justices will act upon the petition within thirty days after it is delivered to

them, and the clerk is directed to report in writing to the Court in conference all petitions to rehear not acted on within the time required.

When Rehearing Allowed.—No case will be reviewed upon petition to rehear, unless it was decided hastily and some material point was overlooked, or some direct authority was not called to the attention of the Court. *Haywood v. Daves*, 81 N.C. 8 (1879); *Mullen v. Norfolk & N.C. Canal Co.*, 115 N.C. 15, 20 S.E. 167 (1894).

In an action for construction of a will, a former decision of this Court, rendered when the Court was differently constituted from what it is at present, should not be reversed because the present members of the Court might infer differently as to the intention of the testatrix from the words and context of the will. *Devereux v. Devereux*, 81 N.C. 12 (1879).

This petition to rehear having been fully and carefully considered, and it appearing that the errors assigned have already been passed upon in well considered opinions of this Court, and no new fact has been called to the attention of the Court, or new case or authority cited, or new position assumed, the petition is dismissed. *Weston v. John L. Roper Lumber Co.*, 168 N.C. 98, 83 S.E. 693 (1914).

Rehearing a Matter of Discretion.—Unlike an appeal, a petition to rehear is a matter in the discretion of the Supreme Court to be exercised under the rules prescribed by it. *Moore v. Harkins*, 179 N.C. 525, 103 S.E. 12 (1920).

Presumption in Favor of Judgment.—Rehearings of decisions of cases of this Court are granted only in exceptional cases, and, when granted, every presumption is in favor of the judgment already rendered. *Weisel v. Cobb*, 122 N.C. 67, 30 S.E. 312 (1898).

Rehearing by Means of Second Appeal Not Allowed.—A second appeal on matters determined by a decision on a former appeal will not be considered, the procedure being by a motion to rehear. *Gainesville & Alachua County Hosp. Ass'n v. Atlantic Coast Line R.R.*, 157 N.C. 460, 73 S.E. 242 (1911); *LaRouge v. Kennedy*, 161 N.C. 459, 77 S.E. 695 (1913).

Where a carrier does not take the proper steps to have a judgment rendered against it in the State court reviewed in the United States court upon a defense set up in denial of its rights under the Federal law, and seeks to enjoin the enforcement of the judgment in the State courts, it is an endeavor to obtain a rehearing of the case by means of a second suit, which is not per-

missible. *North Carolina R.R. v. Story*, 187 N.C. 184, 121 S.E. 433 (1924).

Same State of Facts Will Not Warrant Second Appeal.—A party to an action may not have the decision of the Supreme Court again reviewed by it, upon a second appeal, upon the same state of facts, the former decision having become the law of the case. *Strunks v. Southern Ry.*, 188 N.C. 567, 125 S.E. 182 (1924).

No Rehearing on Summary Motion.—A rehearing will not be granted upon a summary motion to modify a final judgment of this Court. *Ruffin v. Harrison*, 91 N.C. 398 (1884).

Only Points Certified as Erroneous Considered.—Upon a rehearing, the Supreme Court will not consider any point not certified as erroneous by counsel making the certificate. *Kerr v. Hicks*, 133 N.C. 175, 45 S.E. 529 (1903).

When Conclusion Assigned as Error.—It is unnecessary to consider a broadside assignment of error in a petition to rehear, "for that, granting the correctness of every legal proposition laid down by the Court, and that its findings and inferences of fact were supported by the record, yet the conclusion reached by the Court in its opinion is erroneous." *Bunn v. Braswell*, 142 N.C. 113, 55 S.E. 85 (1906).

When Error Committed in Former Decision.—The doctrine of stare decisis has no application, when it clearly appears that error has been committed in the decision of the former case by the Supreme Court; and where the exceptions present, on the second appeal, under different and somewhat similar statutes, the question as to whether a mandamus will lie for the failure of the county commissioners to make a special levy for the payment of the principal of the sinking funds for road bonds of a certain district, and the Supreme Court has erroneously decided that it was unnecessary as to another road district within the same county, on the appeal in the later case the position is untenable that it was an attempt to obtain a rehearing contrary to the rules on the subject. *Sidney Spitzer & Co. v. Commissioners*, 188 N.C. 30, 123 S.E. 636 (1924).

When Petitioner Guilty of Laches.—A petition to rehear a case in the Supreme Court will not be granted when the alleged error is attributable solely to the petitioner's own laches or want of attention in looking after his case or he has neglected to follow the rules of procedure necessary to a proper presentment thereof, and especially when there is nothing

to warrant the assurance that substantial relief would otherwise be afforded him. *Battle v. Mercer*, 188 N.C. 116, 123 S.E. 258 (1924).

Immaterial Assumption.—It is no ground for the rehearing of a case that the defendant was assumed to be a citizen of North Carolina, whereas, in fact, he was not, when the place of his residence is immaterial. *Blackwell v. Wright*, 74 N.C. 733 (1876).

When Everything Considered on First Hearing.—Where neither the record nor the briefs on the rehearing of a case disclose anything that was not apparently considered on the first hearing, the former judgment will not be disturbed. *Weisel v. Cobb*, 122 N.C. 67, 30 S.E. 312 (1898).

New Trial for Newly Discovered Evidence.—A motion for a new trial, in the Supreme Court, upon the ground of newly discovered evidence, is a matter for the full Court, and will not be entertained after the case has been certified down, nor will an ungranted petition to rehear, made at the same time to the Justices of the Court, under the rule, put the case in the Supreme Court. *Smith v. Moore*, 150 N.C. 158, 63 S.E. 735 (1909).

Contents of Affidavit.—It is required for the granting of a motion for a new trial upon the ground of newly discovered evidence, that it should appear by affidavit that the desired testimony will be given upon the new trial; that it is probably true, competent, and material; that there has been no laches, but that the movant had used diligence and means to procure the evidence in due time at the trial; that the evidence is not cumulative and does not tend only to contradict, impeach, or discredit a witness who has testified, and is of such a nature as to show that probably a different result will be reached on another trial, so that right will prevail. *Johnson v. Seaboard Air Line R.R.*, 163 N.C. 431, 79 S.E. 690, 1915B Ann. Cas. 598 (1913).

In criminal actions, the Supreme Court will deny a motion for a new trial made upon the ground of newly discovered evidence. *State v. Griffin*, 190 N.C. 133, 129 S.E. 410 (1925).

New trial in criminal actions for newly discovered evidence.—When a judgment in a criminal action has been affirmed and certified to the clerk of the superior court, it is in the latter court for execution of the sentence, and a motion for new trial may be there entertained for disqualification of jurors and newly discovered

evidence, § 15-174, and the motion is made in apt time if made at the next succeeding term after the case is certified down. *State v. Casey*, 201 N.C. 620, 161 S.E. 81 (1931).

When Petitioner Erroneously Deprived of Property.—Upon a petition to rehear, the case will be corrected when it appears that the petitioner has thereby been erroneously deprived of its property. *State ex rel. Lee v. Martin*, 188 N.C. 119, 123 S.E. 631 (1924).

Omission of Questions Not Discussed in Brief.—A petition to rehear in the Supreme Court will be denied when founded upon the ground that a certain question was not mentioned in the opinion, when it had not been discussed in movant's brief according to Rule 28, and he has not appealed from the judgment. *Greene v. Lyles*, 187 N.C. 598, 122 S.E. 297 (1924).

When No Error Assigned.—Where no exception is taken in trial court to a ruling, and no error is assigned upon rehearing, the Supreme Court will not review the ruling. *Faison v. Grandy*, 128 N.C. 438, 38 S.E. 897 (1901).

Second Petition to Rehear.—Where a petition to rehear a case in the Supreme Court has been allowed, the opposing party only may petition for a second rehearing thereof. *Moore v. Harkins*, 179 N.C. 525, 103 S.E. 12 (1920).

A party whose application for a rehearing of the case has been denied may not successfully petition for a rehearing, though additional reasons are given in the denial of the former petition by the Court in reaching the same conclusion. *Moore v. Harkins*, 179 N.C. 525, 103 S.E. 12 (1920).

Costs When New Trial Granted.—Where, upon a rehearing, the Court grants a new trial, which was refused on the former hearing, all the costs of the appeal, including those of the rehearing, are properly taxed against the appellee. *Waldo v. Wilson*, 174 N.C. 767, 94 S.E. 715 (1917).

Reasons for Denying Petition Not Usually Set Out.—The reasons for denying a petition to rehear in the Supreme Court are not usually set out. *Crowell v. Crowell*, 181 N.C. 66, 106 S.E. 149 (1921).

Applied in *Etheridge v. Vernoy*, 71 N.C. 184 (1874); *Neal v. Cowles*, 71 N.C. 266 (1874); *Grant v. Edwards*, 88 N.C. 246 (1883); *Wilson v. Lineberger*, 90 N.C. 180 (1884); *McDonald v. Carson*, 95 N.C. 377 (1886); *Huyett & Smith Mfg. Co. v. Gray*, 126 N.C. 108, 35 S.E. 236 (1900); *Hendon v. North Carolina R.R.*, 127 N.C. 110, 37

S.E. 155 (1900); Morganton Hardware Co. v. Morganton Graded Schools, 151 N.C. 507, 66 S.E. 583 (1909); Forest City Cotton Co. v. Mills, 219 N.C. 279, 13 S.E.2d 557 (1941).

(5) New Briefs to Be Filed. There shall be no oral argument before the Justices or Justice thus designated, before it is acted on by them, and if they order the petition docketed, there shall be no oral argument thereon before the Court (unless the Court of its own motion shall direct an oral argument, but it shall be submitted on the record at the former hearing, the printed petition to rehear, and a brief to be filed by the petitioner within ten days after the petition is ordered to be docketed, and a brief to be filed by the respondent within twenty days after such order to docket. Such briefs shall not be the briefs on the first hearing, but shall be new briefs, directed to the errors assigned in the petition, and shall be printed. If not printed and filed in the prescribed time by the petitioner, the petition will be dismissed, and for default in either particular by the respondent the cause will be disposed of without such brief.

(6) When Petition Docketed for Rehearing. The petition may be ordered docketed for a rehearing as to all points recited by the two certifying counsel (who cannot certify to errors not alleged in the petition), or it may be restricted to one or more of the points thus certified, as may be directed by the Justices who grant the application. When a petition to rehear is ordered to be docketed, notice shall at once be given by the clerk to counsel on both sides.

When Petition Will be Dismissed. — Petitions to rehear will be dismissed where the grounds of error assigned are substantially the same as on the former hearing, and no new facts appear, no new authorities cited, and no new positions assumed. *Montgomery v. Blades*, 223 N.C. 331, 26 S.E.2d 567 (1943).

(7) Stay of Execution. When a petition to rehear is filed with the clerk of this Court, the Justice or Justices designated by the petitioner to pass upon it may, upon application and in his or their discretion, stay or restrain execution of the judgment or order until the certificate for a rehearing is either refused or, if allowed, until this Court has finally disposed of the case on the rehearing. Unless the party applying for the rehearing has already stayed execution in the Court below, when the appeal was taken, by giving the required security, he shall, at the time of applying to the Justice or Justices for a stay, tender sufficient security for that purpose, which shall be approved by the Justice or Justices. Notice of the application for a stay must be given to the other party, if deemed proper by the Justice or Justices, for such time before the hearing of the application and in such manner as may be ordered. If a petition for a hearing is denied, or if granted, and the petition is afterwards dismissed, the stay shall no longer continue in force, and execution may issue at once, or the judgment or order be otherwise enforced, unless, in case the petition is dismissed, the Court shall otherwise direct. When a stay is granted, the order shall run in the name of this Court and be signed and issued by the clerk, under its seal, with proper recitals to show the authority under which it was issued.

45. Sittings of the Court

The Court will sit daily, during the terms, Sundays and Mondays excepted, from 10 a. m. to 2 p. m., for the hearing of causes, except when the docket of a district is exhausted before the close of the week allotted to it.

46. Citation of Reports

Inasmuch as all the volumes of Reports prior to the 63d have been reprinted by the State, with the number of the volume instead of the name of the reporter, counsel will cite the volumes prior to 63 N. C. as follows:

1 and 2 Martin, Taylor & Conf.	as	1 N. C.
1 Haywood	as	2 N. C.
2 Haywood	as	3 N. C.
1 and 2 Car. Law Repository & N. C. Term	as	4 N. C.
1 Murphey	as	5 N. C.
2 Murphey	as	6 N. C.
3 Murphey	as	7 N. C.
1 Hawks	as	8 N. C.
2 Hawks	as	9 N. C.
3 Hawks	as	10 N. C.
4 Hawks	as	11 N. C.
1 Devereux Law	as	12 N. C.
2 Devereux Law	as	13 N. C.
3 Devereux Law	as	14 N. C.
4 Devereux Law	as	15 N. C.
1 Devereux Eq.	as	16 N. C.
2 Devereux Eq.	as	17 N. C.
1 Dev. & Bat. Law	as	18 N. C.
2 Dev. & Bat. Law	as	19 N. C.
3 & 4 Dev. & Bat. Law	as	20 N. C.
1 Dev. & Bat. Eq.	as	21 N. C.
2 Dev. & Bat. Eq.	as	22 N. C.
1 Iredell Law	as	23 N. C.
2 Iredell Law	as	24 N. C.
3 Iredell Law	as	25 N. C.
4 Iredell Law	as	26 N. C.
5 Iredell Law	as	27 N. C.
6 Iredell Law	as	28 N. C.
7 Iredell Law	as	29 N. C.
8 Iredell Law	as	30 N. C.
9 Iredell Law	as	31 N. C.
10 Iredell Law	as	32 N. C.
11 Iredell Law	as	33 N. C.
12 Iredell Law	as	34 N. C.
13 Iredell Law	as	35 N. C.
1 Iredell Eq.	as	36 N. C.
2 Iredell Eq.	as	37 N. C.
3 Iredell Eq.	as	38 N. C.
4 Iredell Eq.	as	39 N. C.
5 Iredell Eq.	as	40 N. C.
6 Iredell Eq.	as	41 N. C.
7 Iredell Eq.	as	42 N. C.
8 Iredell Eq.	as	43 N. C.
Busbee Law	as	44 N. C.
Busbee Eq.	as	45 N. C.
1 Jones Law	as	46 N. C.
2 Jones Law	as	47 N. C.
3 Jones Law	as	48 N. C.
4 Jones Law	as	49 N. C.
5 Jones Law	as	50 N. C.
6 Jones Law	as	51 N. C.
7 Jones Law	as	52 N. C.

8 Jones Law	as 53 N. C.
1 Jones Eq.	as 54 N. C.
2 Jones Eq.	as 55 N. C.
3 Jones Eq.	as 56 N. C.
4 Jones Eq.	as 57 N. C.
5 Jones Eq.	as 58 N. C.
6 Jones Eq.	as 59 N. C.
1 and 2 Winston	as 60 N. C.
Phillips Law	as 61 N. C.
Phillips Eq.	as 62 N. C.

In quoting from the reprinted Reports counsel will cite always the marginal (i.e., the original) paging, except 20 N. C., which is repaged throughout, without marginal paging.

47. Court Reconvened

The Court may be reconvened at any time after final adjournment by order of the Chief Justice, or, in the event of his inability to act, by one of the Associate Justices in order of seniority.

(2) SUPPLEMENTARY RULES

GOVERNING THE HEARING OF CAUSES IN THE SUPREME COURT
WHICH WERE ORIGINALLY DOCKETED IN THE COURT OF
APPEALS AND OTHER RULES REQUIRED BY THE ACT
ESTABLISHING THE COURT OF APPEALS.

(Adopted September 28, 1967, as amended through December 11, 1968)

Rule 1. Discretionary Review by the Supreme Court before Determination by the Court of Appeals.

(a) Causes docketed in the Court of Appeals for appellate review may be certified for appellate review by the Supreme Court, before determination by the Court of Appeals, upon petition for writ of certiorari filed in the Supreme Court by any of the parties when:

- (1) The subject matter of the appeal has significant public interest, or
- (2) The cause involves legal principles of major significance to the jurisprudence of the State, or
- (3) Delay in final adjudication is likely to result from failure to certify and thereby cause substantial harm.

A petition for writ of certiorari filed under subsection (a) of this rule shall be filed within fifteen days after the cause is docketed in the Court of Appeals; in all other respects Rule 34 of the Rules of Practice in the Supreme Court shall apply.

(b) The Supreme Court, upon its own motion and in accordance with a memorandum of procedure issued from time to time by the Supreme Court, may certify for appellate review by the Supreme Court, before determination by the Court of Appeals, causes docketed in the Court of Appeals for appellate review when in the opinion of the Supreme Court:

- (1) The subject matter of the appeal has significant public interest, or
- (2) The cause involves legal principles of major significance to the jurisprudence of the State, or
- (3) Delay in final adjudication is likely to result from failure to certify and thereby cause substantial harm, or
- (4) The work load of the Courts of the Appellate Division is such that the expeditious administration of justice requires certification.

Note.—Neither subsection (a) nor (b) the North Carolina Industrial Commission; of this rule is applicable to appeals docketed in the Court of Appeals from the North Carolina Utilities Commission or to post-conviction proceedings under Article 22, Chapter 15, of the General Statutes of North Carolina.

Rule 2. Discretionary Review by the Supreme Court after Determination by the Court of Appeals.

(a) Causes determined by the Court of Appeals may be certified for further appellate review by the Supreme Court upon petition for writ of certiorari filed in the Supreme Court by any of the parties when:

- (1) The subject matter of the appeal has significant public interest, or
- (2) The cause involves legal principles of major significance to the jurisprudence of the State, or
- (3) The decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court.

Interlocutory determinations by the Court of Appeals, including orders remanding the cause for a new trial or for other proceedings, shall be certified for review by the Supreme Court only upon a determination by the Supreme Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm.

A petition for writ of certiorari filed under subsection (a) of this rule shall be filed within fifteen days after the date of the certification to the trial tribunal of

the determination of the Court of Appeals; in all other respects Rule 34 of the Rules of Practice in the Supreme Court shall apply.

(b) The Supreme Court, upon its own motion and in accordance with a memorandum of procedure issued from time to time by the Supreme Court, may certify causes determined by the Court of Appeals for further appellate review by the Supreme Court when in the opinion of the Supreme Court:

(1) The subject matter of the appeal has significant public interest, or

(2) The cause involves legal principles of major significance to the jurisprudence of the State, or

(3) The decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court.

Interlocutory determinations by the Court of Appeals, including orders remanding the cause for a new trial or for other proceedings, shall be certified for review by the Supreme Court only upon a determination by the Supreme Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm.

In causes certified under subsection (a) or (b) of this rule the Supreme Court will review the decision of the Court of Appeals.

Note.—Neither subsection (a) nor (b) of this rule applies to post-conviction proceedings under Article 22, Chapter 15, of the General Statutes of North Carolina.

Cited in Nationwide Mut. Ins. Co. v. Hayes, 276 N.C. 620, 174 S.E.2d 511 (1970).

Rule 3. Appeals as of Right from the Court of Appeals to the Supreme Court.

When an appeal as a matter of right is taken to the Supreme Court from a decision of the Court of Appeals as provided in G.S. 7A-30, the appealing party shall:

(a) Within 15 days from the date of the certificate of the Clerk of the Court of Appeals to the trial tribunal, give written notice of appeal to the Clerk of the Court of Appeals, to the Clerk of the Supreme Court, and to the opposing parties;

(b) When the appeal is based on involvement of a substantial constitutional question, specify in the notice of appeal the article and section of the Constitution allegedly involved and state with particularity how appellant's rights thereunder have been violated; affirmatively state that the constitutional question involved was timely raised (in the trial court if it could have been or in the Court of Appeals if not) and either not passed upon or passed upon erroneously;

(c) File supplemental briefs as required by Rule 7, Supplementary Rules of the Supreme Court (221 N.C. 747).

All appeals under G.S. 7A-30 shall be docketed in the Supreme Court within ten (10) days after giving the required notice of appeal.

The Supreme Court shall calendar the cause for hearing at any time it may deem appropriate after the expiration of twenty-eight (28) days from the date on which the cause was docketed in the Supreme Court.

The appellant's brief must be filed within ten (10) days after the appeal is docketed, and the appellee's brief must be filed within twenty (20) days after the appeal is docketed.

Editor's Note.—The amendment adopted April 30, 1968, rewrote the rule.

The amendment adopted Dec. 11, 1968, inserted "When the appeal is based on in-

volvement of a substantial constitutional question" at the beginning of paragraph (b) and added the fifth and last paragraphs.

Rule 4. "Appellant" Defined.

The word "appellant" as used in these Supplementary Rules means: (1) With respect to appeals as of right, the party who appeals from the decision of the Court

of Appeals to the Supreme Court; (2) with respect to discretionary review by the Supreme Court after determination by the Court of Appeals, the party who petitioned for certiorari or other writ.

Rule 5. Record on Appeal in the Supreme Court—What Constitutes.

(a) When a cause is docketed in the Supreme Court pursuant to the provisions of Rule 1 or Rule 2 of these Supplementary Rules, or pursuant to G.S. § 7A-30 or G.S. § 7A-31, the record and exhibits, if any, docketed in the Court of Appeals shall constitute the record on appeal in the Supreme Court; provided such record complies with the Rules of the Court of Appeals.

(b) When a cause is docketed in the Supreme Court pursuant to the provisions of Rule 2 of these Supplementary Rules, the petitioner shall attach to his petition a copy of the opinion of the Court of Appeals. Likewise, the petitioner in any cause docketed in the Supreme Court under G.S. § 7A-31, after it has been determined by the Court of Appeals, shall attach to his petition a copy of the opinion of the Court of Appeals. Unless a narration of the evidence is contained in the record initially docketed in the Court of Appeals, the transcript of the evidence shall, if pertinent to questions raised by the petitioner, be filed with the Clerk of the Supreme Court by the Clerk of the Court of Appeals.

Editor's Note.—The amendment adopted in present paragraph (a) and added paragraph (b), June 14, 1968, inserted "or G.S. § 7A-31" in graph (b).

Rule 6. Records and Briefs.

When a cause is removed to the Supreme Court pursuant to Rule 1 of these Supplementary Rules, twelve copies of the record and twelve copies of the brief of the respective parties, if filed, shall be filed in the office of the Clerk of the Supreme Court; provided, however, if the briefs have not been filed at the time of the removal of the cause, twelve copies of the respective briefs must be filed with the Clerk of the Supreme Court and the remaining number of said briefs required by Rule 27 of the Rules of the Court of Appeals shall be filed with the Clerk of the Court of Appeals.

The cause shall be deemed docketed in the Supreme Court as of the date the Supreme Court in writing orders the transfer of said cause to the Supreme Court pursuant to Supplementary Rule 13.

Editor's Note.—The amendment adopted Dec. 11, 1968, added the second paragraph.

Rule 7. Records and Briefs—Review of a Determination of the Court of Appeals by Supreme Court.

When a cause is allowed to be docketed in the Supreme Court for review of the determination made by the Court of Appeals, as provided by Rule 2 of these Supplementary Rules, or pursuant to G.S. § 7A-30, twelve copies of the record and twelve copies of the brief of the respective parties shall be filed with the Clerk of the Supreme Court, subject to the provisions contained in Rule 5 of these Supplementary Rules. Provided, however, in all causes for review of a determination made by the Court of Appeals, the respective parties shall file a new or supplemental brief dealing with the question or questions sought to be reviewed by the Supreme Court.

Rule 8. Briefs in Causes for Review.

When a cause is docketed in the Supreme Court for review of a determination made by the Court of Appeals, the cause shall not be calendared for hearing until after the expiration of twenty-eight days from the date the cause was docketed in the Supreme Court. And the appellant shall have ten days after the cause is docketed in the Supreme Court to file twenty-five copies of a new or supplemental brief. The appellee shall file twenty-five copies of a new or supplemental brief

within twenty days after the cause is docketed in the Supreme Court. (In pauper appeals, briefs may be filed as provided by Rule 22 of the Rules of Practice in the Supreme Court.)

The cause shall be deemed docketed as of the date certiorari is granted or an order certifying transfer to the Supreme Court is entered pursuant to Supplementary Rule 13.

Editor's Note.—The amendment adopted Dec. 11, 1968, substituted "ten" for "fourteen" in the second sentence, substituted "twenty days" for "twenty-one days" in the third sentence and added the second paragraph.

Rule 9. Time of Hearing a Cause for Review.

When a cause has been determined in the Court of Appeals and a petition for certiorari or other writ is allowed and the cause ordered docketed in the Supreme Court for review, the Supreme Court may calendar the cause for hearing at any time it may deem appropriate after the expiration of twenty-eight days from the date on which the cause was docketed in the Supreme Court.

Rule 10. Hearing of Causes Not Determined by the Court of Appeals.

When a cause has been docketed in the Supreme Court before a determination thereof has been made by the Court of Appeals, the Supreme Court may calendar the cause for hearing at such time as it may deem appropriate; provided the time has expired in which the cause might have been calendared for hearing in the Court of Appeals.

Rule 11. Removal of Cause Not Determined by the Court of Appeals Does Not Extend Time for Filing Briefs.

The removal of a cause to the Supreme Court from the Court of Appeals before the Court of Appeals has determined the cause shall not extend the time for filing briefs by the respective parties unless otherwise ordered by the Supreme Court.

Rule 12. Notice to Counsel of Record with Respect to Time of Hearing.

The Clerk of the Supreme Court shall give twenty days' notice to counsel of record in a cause prior to the time set for hearing the cause in the Supreme Court. Such notice shall apply to all hearings in the Supreme Court in which the cause was originally docketed in the Court of Appeals.

Rule 13. Causes Transferred by Written Order.

Whenever a cause which has been filed with the Court of Appeals is to be heard by the Supreme Court under provisions of G.S. § 7A-31, either before or after hearing by the Court of Appeals, the Supreme Court will in writing order the transfer of said cause to the Supreme Court.

Rule 14. Appeals from District Court Pending in Superior Court—How Disposed of.

Civil cases tried in the District Court in which notice of appeal to the Superior Court has been given on or before September 30, 1967, and which have not been finally determined in the Superior Court on that date, shall be disposed of in the Superior Court in accordance with the laws and rules governing such appeals which were applicable immediately prior to the first day of October, 1967. This rule is made pursuant to the provisions of G.S. § 7A-35 (a).

Rule 15. Appeals from Industrial Commission and Utilities Commission Pending in Superior Court—How Disposed of.

All causes heard by the Industrial Commission, and all causes heard by the Utilities Commission, in which notice of appeal to the Superior Court has been

given on or before September 30, 1967, and which have not been finally determined in the Superior Court on that date, shall be disposed of in the Superior Court in accordance with the laws and rules governing such appeals which were applicable immediately prior to the first day of October, 1967. This rule is made pursuant to the provisions of G.S. § 7A-35 (d).

Rule 16. Rules of Practice and Procedure in Superior Court Applicable to District Court.

The rules of practice and procedure now in effect in the Superior Courts shall, where applicable, be the rules of practice and procedure in the District Courts. This rule is made pursuant to G.S. § 7A-34. This rule shall become effective October 1, 1967.

Rule 17. Opinions by Emergency Justices and Judges—How Filed When Period of Service Has Expired.

When an emergency Justice or Judge has been recalled to active service under the provisions of G.S. § 7A-39.7, any opinion prepared by him but not filed until after his period of temporary service has expired shall be filed in the same manner and have the same effect as though he were still on active service.

This rule is made pursuant to G.S. § 7A-39.8.

Rule 18. Appeal Bond.

(a) In all appeals as of right from the Court of Appeals to the Supreme Court and in all causes initially determined by the Court of Appeals and certified for further appellate review to the Supreme Court upon petition for certiorari, the appellant shall file with the Clerk of the Supreme Court, when the appeal is docketed in that Court, a written undertaking with good and sufficient surety in the sum of \$200, or deposit cash in lieu thereof, to the effect that the appellant will pay all costs awarded against him on the appeal to the Supreme Court.

(b) The word "appellant" as herein used means: (1) With respect to appeals as of right, the party who appeals from the decision of the Court of Appeals to the Supreme Court; (2) with respect to discretionary review by the Supreme Court on certiorari after determination by the Court of Appeals, the party who petitioned the Supreme Court for certiorari or other writ.

(c) In all causes docketed in the Court of Appeals and certified for appellate review by the Supreme Court before determination by the Court of Appeals, either upon petition for certiorari filed in the Supreme Court by any of the parties or by the Supreme Court upon its own motion, the undertaking on appeal initially filed by the appellant in the Court of Appeals shall stand for the payment of all costs incurred in either the Court of Appeals or the Supreme Court and awarded against him on the appeal.

Editor's Note. — The Supreme Court order adding this rule was adopted May 21, 1968.

(3) ORDER TRANSFERRING CERTAIN CASES FROM THE COURT OF APPEALS TO THE SUPREME COURT

Appeals from Superior Courts docketed in the Court of Appeals after the date of this order shall be transferred by the Clerk of the Court of Appeals to the Supreme Court for review by it, prior to the consideration and determination of such appeals by the Court of Appeals, in:

(1) Any civil action to which the State, a county, a municipal corporation or any agency or officer of any such governmental unit, in the official capacity of such officer, is a party; and

(2) Any criminal action in which the defendant has been convicted of any single offense for which the maximum punishment provided by statute exceeds ten years' imprisonment.

In all such appeals the records and the briefs of all parties shall be filed with the Clerk of the Court of Appeals in compliance with the Rules of Practice in the Court of Appeals.

Upon the completion of the filing of the record and of all briefs in any such appeal, or upon the expiration of the time allowed therefor by the Rules of Practice in the Court of Appeals, whichever shall first occur, the Clerk of the Court of Appeals shall transfer and deliver to the Clerk of the Supreme Court all copies of the record and briefs. The Clerk of the Court of Appeals shall immediately notify all counsel whose names appear upon any brief so filed in such appeal, and any party thereto not represented by counsel, that the appeal has been so transferred.

Thereupon the appeal shall be calendared for oral argument by the Supreme Court. The Clerk of the Supreme Court shall immediately notify all counsel therein, and any party thereto not represented by counsel, of the date upon which oral argument upon the appeal will be heard in the Supreme Court.

This order is entered pursuant to G.S. 7A-31(b)(4) and shall remain in effect until the Supreme Court shall adjourn its Spring Term for the year 1971 or until vacated by further order of the Supreme Court, whichever shall first occur.

This order shall be published in the advance sheets of this Court and of the Court of Appeals so long as it remains in effect.

Done by the Court in conference this the 31st day of July, 1970,

SUPREME COURT OF NORTH CAROLINA

By WILLIAM H. BOBBITT

Chief Justice

(4) RULES OF PRACTICE IN THE COURT OF APPEALS OF NORTH CAROLINA

Submitted to the Supreme Court of North Carolina by the Court of Appeals of North Carolina and approved and adopted in conference by the Supreme Court of North Carolina on September 25, 1967. (See G.S. 7A-16 and G.S. 7A-33.)

Rule

1. Sessions.
2. Definitions.
3. Appeals—How Docketed.
4. Appeals—When Not Entertained.
5. Appeals—When Heard.
6. Appeals—Criminal Actions.
 - (a) Appeal Bond.
 - (b) Pauper Appeals.
 - (c) When Appeal Abates.
 - (d) Appeal Dismissed if Record on Appeal Not Printed or Mimeographed or Otherwise Reproduced as Provided by Rule.
7. Call of Judicial Districts.
8. End of Docket.
9. Call of Docket.
10. Submission on Briefs.
11. Briefs Not Received After Argument.
12. Briefs Regarded as Personal Appearance.
13. When Case May Be Heard Out of Order.
14. When Cases May Be Heard Together.
15. Appeal Dismissed if Not Prosecuted.
16. Motion to Dismiss Appeal — When Made.
17. Appeal Dismissed for Failure to Docket in Time.
 - (1) Appeal Docketed by Appellee When Frivolous and Taken for Purposes of Delay.
18. Appeal Docketed and Dismissed Not to Be Reinstated Until Appellant Has Paid Costs.
19. Record on Appeal.
 - (a) What to Contain and How Arranged.
 - (b) Two Appeals.
 - (c) Exceptions Grouped.
 - (d) Evidence—How Stated.
 - (e) Agreed Statement in Lieu of Record.
 - (f) Statement When No Stenographic Record Was Made.
 - (g) Appeals Involving Juvenile Cases.
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Rule

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Rule

47. Additional Sessions of Court—Reconvening Court.
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 49. Remedial Writs.

Rule

50. Case on Appeal—Extension of Time for Service of.
 Fee Bill—Clerk of the Court of Appeals.

1. Sessions.

It has been determined by the Chief Judge that, until due notice is given otherwise, there will be two sessions of the Court each year: A Spring Session beginning on the fourth Monday in January, which shall have two calls of the districts; and a Fall Session beginning on the third Monday in August, which shall have one call of the districts.

Editor's Note. — For article on "The North Carolina Court of Appeals—An Outline of Appellate Procedure," see 46 N.C.L. Rev. 705 (1968).

The Rules of Practice in the Court of Appeals are mandatory, not directory, and must be uniformly enforced. *State v. Farrell*, 3 N.C. App. 196, 164 S.E.2d 388 (1968).

The Rules of the Court of Appeals are

mandatory and not directory. *State v. Black*, 7 N.C. App. 324, 172 S.E.2d 217 (1970).

Rules Prevail over Conflicting Statute.—To the extent to which § 97-86 is in conflict with the Rules of Practice in the Court of Appeals, the Rules of Practice will prevail. *Fetherbay v. Sharpe Motor Lines*, 8 N.C. App. 58, 173 S.E.2d 589 (1970).

2. Definitions.

(a) When the words "trial tribunal" are used in these rules, they include any judge, court, administrative agency, commission, or other body from which an appeal may be taken to this Court pursuant to law.

3. Appeals—How Docketed.

Each appeal shall be docketed from the judicial district to which it properly belongs, and appeals in criminal cases from each district shall be placed at the head of the docket for the district. Appeals in both civil and criminal cases shall be docketed each in its own class, in the order in which they are filed with the clerk.

4. Appeals—When Not Entertained.

The Court of Appeals will not entertain an appeal:

(a) From an order overruling a demurrer except when the demurrer is interposed as a matter of right for misjoinder of parties and causes of action. The movant may enter an exception to the order overruling the demurrer and present the question thus raised to this Court on the final appeal; provided that when the demurrant conceives that the order overruling his demurrer will prejudicially affect a substantial right to which he is entitled unless the ruling of the Court is reviewed on appeal prior to the trial of the cause on its merits, he may petition this Court for a writ of certiorari within thirty days from the date of the entry of the order overruling the demurrer.

(b) From an order striking or denying a motion to strike allegations contained in pleadings. When a party conceives that such order will be prejudicial to him on the final hearing of said cause, he may petition this Court for a writ of certiorari within thirty days from the date of the entry of the order.

This rule has no application when the order striking a portion of the pleading is in effect a demurrer denying the pleader a right to recover for failure to state facts sufficient to constitute a cause of action. Such an order comes within the provisions of § 1-277 and the party adversely affected

may appeal. *McAdams v. Blue*, 3 N.C. App. 169, 164 S.E.2d 490 (1968).

Where a motion to strike allegations and a prayer for relief relating to punitive damages is granted, the order is treated as a demurrer for failure to allege facts sufficient to constitute a cause of action, and

an immediate appeal is available. *Girard Trust Bank v. Easton*, 3 N.C. App. 414, 165 S.E.2d 252 (1969).

Ordinarily, paragraph (b) of this rule precludes an appeal "from an order striking or denying a motion to strike allegations contained in pleadings." However, when a motion to strike an entire further answer or defense is granted, an immediate appeal is available since such motion is in substance a demurrer. *Girard Trust Bank v. Easton*, 3 N.C. App. 414, 165 S.E.2d 252 (1969).

When an order is entered allowing a mo-

tion to strike in its entirety a further answer or defense, or an order is entered allowing a motion to strike an entire cause of action set up in a pleading, the order amounts to the granting of a demurrer, and is immediately appealable. *Johnson v. Petree*, 4 N.C. App. 20, 165 S.E.2d 757 (1969).

Applied in *Nationwide Mut. Ins. Co. v. Aetna Cas. & Sur. Co.*, 1 N.C. App. 9, 159 S.E.2d 268 (1968).

Cited in *Harris v. Board of Comm'rs*, 1 N.C. App. 258, 161 S.E.2d 213 (1968).

5. Appeals—When Heard.

In order for an appeal to stand for hearing at any call of any session of this Court, the record on appeal must be docketed at least twenty-eight days before the call of the district to which the case belongs, and if so docketed, shall be heard at the next ensuing call of the district, unless for cause it is continued. With respect to appeals from the Industrial Commission, "the district to which the case belongs" shall mean the county in which the alleged accident happened, or in which the employer resides, or in which the employer has his principal office.

If the record on appeal is not docketed within ninety days after the date of the judgment, order, decree, or determination appealed from, the case may be dismissed under Rule 17, if the appellee shall file a proper certificate prior to the docketing of such record on appeal; provided, the trial tribunal may, for good cause, extend the time not exceeding sixty days, for docketing the record on appeal.

Editor's Note. — For note on serving statement of case on appeal in North Carolina, see 47 N.C.L. Rev. 901 (1969).

This rule is mandatory, not directory, and must be uniformly enforced. *State v. Byrd*, 4 N.C. App. 494, 167 S.E.2d 95 (1969).

Rule Explained.—See *Smith v. Starnes*, 1 N.C. App. 192, 160 S.E.2d 547 (1968).

Rule Determines Time for Docketing Record on Appeal.—The time for docketing the record on appeal in the Court of Appeals is determined by this rule and should not be confused with the time allowed for serving case on appeal and the time allowed for serving counterclaim or exceptions. The case on appeal, and the counterclaim or exceptions, and the settlement of case on appeal by the trial tribunal must all be accomplished within a time which will allow docketing of the record on appeal within the time allowed under this rule. *State v. Farrell*, 3 N.C. App. 196, 164 S.E.2d 388 (1968); *Ross v. Sampson*, 4 N.C. App. 270, 166 S.E.2d 499 (1969); *Reece v. Reece*, 6 N.C. App. 606, 170 S.E.2d 546 (1969); *State v. Fulk*, 7 N.C. App. 68, 171 S.E.2d 81 (1969); *State v. Brigman*, 8 N.C. App. 316, 174 S.E.2d 48 (1970).

The case on appeal, and the counterclaim or exceptions, and the settlement of the case on appeal by the trial tribunal must all

be accomplished within a time which will allow docketing of the record on appeal within the time allowed under this rule. *Rector v. Rector*, 4 N.C. App. 240, 166 S.E.2d 492 (1969).

In the absence of an order extending the time for docketing, the record on appeal must be docketed in the Court of Appeals within ninety days after the date of the judgment appealed. *State v. Cooper*, 4 N.C. App. 210, 166 S.E.2d 509 (1969).

Extension of Time for Docketing Record.—The trial tribunal, upon motion by appellant, and upon a finding of good cause therefor, may enter an order extending the time for docketing the record on appeal in the Court of Appeals not exceeding a period of sixty days beyond the ninety days provided by this rule. However, this cannot be accomplished by an order allowing additional time to serve case on appeal. *State v. Farrell*, 3 N.C. App. 196, 164 S.E.2d 388 (1968); *Ross v. Sampson*, 4 N.C. App. 270, 166 S.E.2d 499 (1969); *Reece v. Reece*, 6 N.C. App. 606, 170 S.E.2d 546 (1969); *State v. Fulk*, 7 N.C. App. 68, 171 S.E.2d 81 (1969); *State v. Brigman*, 8 N.C. App. 316, 174 S.E.2d 48 (1970).

An extension of time to docket the record on appeal cannot be accomplished by an extension of time to serve the case on ap-

peal. *Kurtz v. Allstate Ins. Co.*, 6 N.C. App. 625, 170 S.E.2d 496 (1969).

An order extending the time for defendant to serve his case on appeal does not extend the time for docketing the record on appeal. *State v. Brigman*, 8 N.C. App. 316, 174 S.E.2d 48 (1970).

Extension of time for docketing the record on appeal cannot be accomplished by an order allowing additional time to prepare and serve a case on appeal. *State v. Gibbs*, 8 N.C. App. 339, 174 S.E.2d 119 (1970).

Although this rule provides that the trial tribunal may for good cause extend the time not exceeding 60 days for docketing the record on appeal, this authority may not be exercised after the time for docketing in the Court of Appeals has expired. *Dixon v. Dixon*, 6 N.C. App. 623, 170 S.E.2d 561 (1969).

The twenty-eight day rule is a separate and distinct rule, which does not abrogate the ninety day requirement. It applies only after the ninety day requirement has been complied with. *Ross v. Sampson*, 4 N.C. App. 270, 166 S.E.2d 499 (1969).

Rule May Not Be Ignored or Dispensed with.—Neither the judges, nor the solicitors, nor the attorneys, nor the parties have the right to ignore or dispense with the rule requiring docketing within the time prescribed. *State v. Farrell*, 3 N.C. App. 196, 164 S.E.2d 388 (1968); *State v. Byrd*, 4 N.C. App. 494, 167 S.E.2d 95 (1969).

Effect of Noncompliance. — Where defendant fails to docket the record on appeal within the time provided by this rule, the appeal is subject to dismissal (1) under Rule 17 if the appellee shall file a proper certificate prior to the docketing of such record on appeal or (2) under Rule 48 by the Court of Appeals on its own motion. *State v. Garnett*, 4 N.C. App. 367, 167 S.E.2d 63 (1969).

If this rule is not complied with, the Court of Appeals may ex mero motu dismiss the appeal. *State v. Farrell*, 3 N.C. App. 196, 164 S.E.2d 388 (1968); *State v. Byrd*, 4 N.C. App. 494, 167 S.E.2d 95 (1969).

For failure to docket the record on appeal within the time prescribed by the rules, the appeal should be dismissed ex mero motu. *State v. Byrd*, 4 N.C. App. 494, 167 S.E.2d 95 (1969).

Where record on appeal was not docketed in the Court of Appeals within ninety days from date of judgment appealed from and no order was entered extending the time for docketing, the Court of Appeals ex mero motu will dismiss the appeal for

failure to comply with the rules. *Laws v. Palmer*, 4 N.C. App. 510, 167 S.E.2d 49 (1969).

Pursuant to Rule 48, an appeal will be dismissed ex mero motu for failure to docket within the time prescribed by this rule. *North Carolina State Bar v. Temple*, 6 N.C. App. 437, 170 S.E.2d 131 (1969).

Where the record on appeal was docketed in the Court of Appeals after the expiration of the time within which the appeal could be docketed in compliance with this rule, and there was no order extending the time for docketing, the Court of Appeals ex mero motu will dismiss the appeal for failure to comply with the rules. *Young v. State Farm Mut. Auto. Ins. Co.*, 6 N.C. App. 443, 170 S.E.2d 90 (1969).

An appeal is subject to dismissal ex mero motu for failure to docket the record on appeal within 90 days from the date of the judgment appealed from as required by this rule. *Reece v. Reece*, 6 N.C. App. 606, 170 S.E.2d 546 (1969); *Dixon v. Dixon*, 6 N.C. App. 623, 170 S.E.2d 561 (1969).

For failure to comply with the rules respecting the time for docketing the record on appeal, the appeal is subject to dismissal ex mero motu. *Kurtz v. Allstate Ins. Co.*, 6 N.C. App. 625, 170 S.E.2d 496 (1969).

An appeal is dismissed by the Court of Appeals ex mero motu where the record on appeal is docketed more than 90 days after the date of judgment appealed from and the record contains no order extending the time for docketing the record on appeal. *State v. Fulk*, 7 N.C. App. 68, 171 S.E.2d 81 (1969).

A defendant's appeal to the Court of Appeals is subject to dismissal for failure to docket the record on appeal within the time allowed by this rule. *State v. Bocage*, 8 N.C. App. 64, 173 S.E.2d 638 (1970).

An appeal is dismissed by the Court of Appeals ex mero motu where the record on appeal was not docketed within 90 days after the date of the judgment appealed from, and no order extending the time for docketing was entered by the trial court. *Harrell v. Brinson*, 8 N.C. App. 197, 171 S.E.2d 798 (1970).

Appeal is dismissed for failure to docket the record on appeal within 90 days after the date of the judgment appealed from as required by this rule, the time for docketing the record on appeal not having been extended by the trial tribunal. *State v. Daughtry*, 8 N.C. App. 318, 174 S.E.2d 76 (1970).

An appeal is dismissed by the Court of Appeals ex mero motu for defendant's failure to docket the record on appeal within the time allowed by this rule. *State v.*

Brigman, 8 N.C. App. 316, 174 S.E.2d 48 (1970).

An appeal is subject to dismissal where the record on appeal was docketed more than 90 days after the date of the judgment appealed from and no order extending the time for docketing the record on appeal appears in the record. *State v. Gibbs*, 8 N.C. App. 339, 174 S.E.2d 119 (1970).

Withdrawal of Appeal.—Defendant's motion to withdraw his appeal may be allowed by the Court of Appeals in its discretion. *State v. Byrd*, 4 N.C. App. 494, 167 S.E.2d 95 (1969).

The superior court had no authority to permit or allow a defendant to withdraw an appeal to the Court of Appeals after the appeal is docketed here. *State v. Byrd*, 4 N.C. App. 494, 167 S.E.2d 95 (1969).

Hearing Where Record Properly Docketed.—If a record on appeal is properly docketed, but it is docketed within twenty-eight days of "the call of the district to which the case belongs," it will be heard in the Court of Appeals at the second call of that district after the date of docketing. *Ross v. Sampson*, 4 N.C. App. 270, 166 S.E.2d 499 (1969).

If a record on appeal is properly docketed under the ninety day requirement and if it is "docketed at least twenty-eight days before the call of the district to which the case belongs," it will be heard in the Court of Appeals at the next ensuing call of that district. *Ross v. Sampson*, 4 N.C. App. 270, 166 S.E.2d 499 (1969).

Applied in *State v. Squires*, 1 N.C. App. 199, 160 S.E.2d 550 (1968); *Williams v. Williams*, 1 N.C. App. 446, 161 S.E.2d 757 (1968); *Kelly v. Washington*, 3 N.C. App. 362, 164 S.E.2d 634 (1968); *State v. Justice*, 3 N.C. App. 363, 165 S.E.2d 47 (1969); *Robert E. Harris Evangelistic Ass'n v. Board of Tax Supervision*, 3 N.C. App. 479, 165 S.E.2d 67 (1969); *In re Burchette*, 3

N.C. App. 575, 165 S.E.2d 654 (1969); *Simmons v. Edwards*, 3 N.C. App. 591, 165 S.E.2d 345 (1969); *Ellis v. Guilford County*, 4 N.C. App. 111, 165 S.E.2d 688 (1969); *State v. Cline*, 4 N.C. App. 112, 165 S.E.2d 691 (1969); *City of Randleman v. Stevenson*, 4 N.C. App. 113, 165 S.E.2d 693 (1969); *Osborne v. Hendrix*, 4 N.C. App. 114, 165 S.E.2d 674 (1969); *State v. McClain*, 4 N.C. App. 265, 166 S.E.2d 451 (1969); *State v. Verbal*, 5 N.C. App. 517, 168 S.E.2d 515 (1969); *Estridge v. Crab Orchard Dev. Co.*, 5 N.C. App. 604, 169 S.E.2d 53 (1969); *State v. Alphin*, 7 N.C. App. 60, 171 S.E.2d 54 (1969); *Umphlett v. Bush*, 7 N.C. App. 72, 171 S.E.2d 80 (1969); *State v. Stovall*, 7 N.C. App. 73, 171 S.E.2d 84 (1969); *State v. Brown*, 7 N.C. App. 372, 172 S.E.2d 99 (1970); *Fetherbay v. Sharpe Motor Lines*, 8 N.C. App. 58, 173 S.E.2d 589 (1970); *Craven v. Dimmette*, 8 N.C. App. 75, 173 S.E.2d 647 (1970).

Quoted in *State v. Ellisor*, 4 N.C. App. 514, 167 S.E.2d 35 (1969).

Stated in *Roberts v. Stewart*, 3 N.C. App. 120, 164 S.E.2d 58 (1968); *Everett v. St. Paul Fire & Marine Ins. Co.*, 4 N.C. App. 501, 166 S.E.2d 863 (1969); *Coffey v. Vanderbloemen*, 4 N.C. App. 504, 167 S.E.2d 36 (1969).

Cited in *State v. Lynch*, 1 N.C. App. 248, 161 S.E.2d 61 (1968); *Richardson v. Shermer*, 3 N.C. App. 588, 165 S.E.2d 342 (1969); *State v. Stewart*, 4 N.C. App. 249, 166 S.E.2d 458 (1969); *State v. Sherron*, 4 N.C. App. 386, 166 S.E.2d 836 (1969); *State v. Griffin*, 4 N.C. App. 397, 167 S.E.2d 28 (1969); *State v. Barnes*, 4 N.C. App. 446, 167 S.E.2d 76 (1969); *State v. Willis*, 4 N.C. App. 641, 167 S.E.2d 518 (1969); *State v. Parker*, 4 N.C. App. 674, 167 S.E.2d 533 (1969); *In re Custody of Maxwell*, 7 N.C. App. 59, 171 S.E.2d 20 (1969).

6. Appeals—Criminal Actions.

Appeals in criminal cases, docketed twenty-eight days before the call of the docket for their districts, shall be heard before the appeals in civil cases from said districts. Criminal appeals docketed after the time above stated and docketed for at least twenty-eight days shall be called immediately at the close of argument of appeals from the Eighth District in the order of filing, unless for cause otherwise ordered, and shall have priority over civil cases placed at the end of the docket.

(a) *Appeal Bond.* If a justified appeal bond (except in pauper appeals) is not filed with the record on appeal, as required by G.S. 1-286, the appeal will be dismissed.

(b) *Pauper Appeals.* See Rule 22.

(c) *When Appeal Abates.* See Rule 37.

(d) *Appeal Dismissed if Record on Appeal Not Printed or Mimeographed or Otherwise Reproduced as Provided by Rule.* See Rule 24.

7. Call of Judicial Districts.

Appeals to the Court of Appeals from the judicial districts of the State will be called for hearing in the following order, unless otherwise ordered under G.S. 7A-19 (c):

Third Division (1st through 3rd weeks of session)

From the Seventeenth and Twenty-first Districts, the first week of the session

From the Eighteenth and Nineteenth Districts, the second week of the session

From the Twentieth, Twenty-second and Twenty-third Districts, the third week of the session

Second Division (5th through 7th weeks of session)

From the Ninth, Twelfth and Thirteenth Districts, the fifth week of the session

From the Tenth and Eleventh Districts, the sixth week of the session

From the Fourteenth, Fifteenth and Sixteenth Districts, the seventh week of the session

Fourth Division (10th and 11th weeks of session)

From the Twenty-sixth, Twenty-ninth and Thirtieth Districts, the tenth week of the session

From the Twenty-fourth, Twenty-fifth, Twenty-seventh and Twenty-eighth Districts, the eleventh week of the session

First Division (14th and 15th weeks of session)

From the First, Second, Third and Seventh Districts, the fourteenth week of the session

From the Fourth, Fifth, Sixth and Eighth Districts, the fifteenth week of the session.

A second call of the districts in the Spring Session will be held as follows:

During the Eighteenth through the Twenty-second weeks of the Spring Session, this Court will set for hearing those appeals which have been docketed too late for the first call of the districts but at least twenty-eight days before the second call, and they will be called for hearing in the following order, unless otherwise ordered by the Court:

Third Division (18th and 19th weeks of session)

From the Seventeenth, Eighteenth, and Twenty-first Districts, the eighteenth week of the session

From the Nineteenth, Twentieth, Twenty-second and Twenty-third Districts, the nineteenth week of the session

Second Division (21st week of session)

From the Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth and Sixteenth Districts, the twenty-first week of the session

Fourth and First Divisions (22nd week of session)

From the Twenty-fourth, Twenty-fifth, Twenty-sixth, Twenty-seventh, Twenty-eighth, Twenty-ninth, Thirtieth, the First, Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth Districts, the twenty-second week of the session.

8. End of Docket.

At the Spring Session, causes not reached and disposed of during the period allotted to each district, and those for any other cause put to the foot of the docket, shall be called at the close of argument of appeals from the Eighth District, and each cause, in its order tried or continued, subject to Rule 6.

At the Fall Session, appeals in criminal cases only will be heard at the end of the docket, unless the Court for special reason shall set a civil appeal to be heard at the end of the docket at that session.

At either session the Court in its discretion may place cases not reached on the call of a district at the end of the call of some other district.

9. Call of Docket.

Each appeal shall be called in its proper order. If any party shall not be ready, the appeal, if in a civil action, may be put to the foot of the district by consent of counsel or for cause, and be again called when reached, if the docket shall be called a second time; otherwise, the first call shall be peremptory. At the first week of each session of the Court in the year a cause may, by consent of the Court, be put to the foot of the docket; if no counsel appear for either party at the first call, it will be put at the end of the district, unless a printed brief is filed by one of the parties; and if none appear at the second call, it will be continued, unless the Court shall otherwise direct. Appeals in criminal actions will be called peremptorily for argument on the first call of the docket, unless for good cause assigned.

10. Submission on Briefs.

By consent of counsel, any case may be submitted without oral argument, upon briefs by both sides, without regard to the number of the case on the docket, or date of docketing the appeal. Such consent must be signed by counsel of both parties and filed, and the clerk shall make a note thereof on the docket; but the Court, notwithstanding, may direct an oral argument to be made, if it shall deem best.

An appeal submitted under this rule must be docketed before the twenty-first week of the Spring Session, or the fourteenth week of the Fall Session has been entered upon, unless it appears to the Court from the record that there has been no delay in docketing the appeal, and that it has been docketed as soon as practicable, and that public interest requires a speedy hearing of the case.

Cited in *State v. Moore*, 6 N.C. App. 596,
170 S.E.2d 568 (1969).

11. Briefs Not Received After Argument.

When the case is argued orally on the regular call of the docket, in behalf of only one of the parties, no written argument for the other party will be received, unless it is filed before the oral argument begins. No brief or written argument will be received after a case has been argued or submitted, except upon leave granted in open court, after notice to opposing counsel.

A brief entitled "Reply to Argument of Appellees" that was filed with the clerk of the Court of Appeals after argument in that Court was not considered where ap-

as required by this rule. *Roughton v. Jim Walter Corp.*, 8 N.C. App. 325, 174 S.E.2d 389 (1970).

pellant failed to obtain leave of the Court

Quoted in *Parsons v. Ussery*, 4 N.C. App. 96, 165 S.E.2d 669 (1969).

12. Briefs Regarded as Personal Appearance.

When a case has been scheduled for oral argument and is reached on the regular call of the docket, in the event of the absence of counsel for either or both sides, the briefs shall be considered as personal appearance.

13. When Case May Be Heard Out of Order.

In cases where the State is concerned, involving or affecting some matter of general public interest, the Court may, upon motion of the Attorney General, assign an earlier place on the calendar, or fix a day for the argument thereof, which shall take precedence of other business. Similarly the Court in its judgment may make a like assignment at the instance of a party to a cause which directly involves the right to a public office, or at the instance of a party arrested in a civil action who is in jail by reason of inability to give bond or from the refusal of the Court to discharge him, or in other cases of sufficient importance.

14. When Cases May Be Heard Together.

Two or more cases involving the same question may, by order of the Court, be heard together and argued as one case.

Stated in *Shore v. Shore*, 7 N.C. App. 197, 171 S.E.2d 798 (1970).

15. Appeal Dismissed if Not Prosecuted.

Cases not prosecuted within twelve months after docketing shall, when reached in order thereafter, be dismissed at the cost of the appellant, unless the same, for sufficient cause, shall be continued. When so dismissed, the appellant may, not later than the corresponding week of the next succeeding session, move for cause to have the same reinstated, on notice to the appellee.

16. Motion to Dismiss Appeal—When Made.

A motion to dismiss an appeal for noncompliance with the requirements of the statutes or rules of Court in perfecting an appeal must be made in writing and filed with the clerk of this Court, together with a copy for opposing counsel, at or before entering upon the argument of the appeal upon its merits and such motion must set out the grounds of noncompliance. Such motion will be allowed unless such compliance be shown in the record or a waiver thereof appear therein, or such compliance is dispensed with by a writing signed by the appellee or his counsel, or unless this Court shall allow appropriate amendments.

Cited in *Williams v. Williams*, 1 N.C. App. 446, 161 S.E.2d 757 (1968); *Bryant v. Snyder*, 3 N.C. App. 65, 164 S.E.2d 35 (1968); *Richardson v. Shermer*, 3 N.C. App. 588, 165 S.E.2d 342 (1969); *Parsons v. Ussery*, 4 N.C. App. 96, 165 S.E.2d 669 (1969); *State v. Rogers*, 7 N.C. App. 572, 172 S.E.2d 883 (1970).

17. Appeal Dismissed for Failure to Docket in Time.

If the appellant shall fail to bring up and file the record on appeal before the call of cases from the district to which the case belongs, by failure to comply with Rule 5, the appellee may file with the clerk of this Court a motion to docket and dismiss at appellant's cost. The appellee must file a certificate of the clerk or comparable officer of the trial tribunal from which the appeal comes, showing the names of the parties thereto, the time when the judgment, order, decree, or determination was entered, and appeal therefrom taken, the name of the appellant, and the date of the settling of the case on appeal, if any has been settled. The motion may be allowed within ten days or at the first session of the Court thereafter, with leave to the appellant within thirty days and after five days' notice to the appellee to apply for the redocketing of the cause; provided, that such motion of appellee to docket and dismiss the appeal will not be considered unless the appellee, before making such motion to dismiss, has paid the clerk of this Court the fee charged by the statute or rule of Court for docketing an appeal, the fee for preparing and entering judgment, and the determination fee; execution for such amount to issue in favor of appellee against appellant.

(1) *Appeal Docketed by Appellee When Frivolous and Taken for Purposes of Delay.* A record on appeal which is obviously frivolous and appears to have been taken only for purposes of delay, may be docketed in this Court by appellee before the time required by Rule 5, and if it appears to the Court that the appellee's contention is correct, the appeal will be dismissed at cost of appellant.

Where defendant fails to docket the record on appeal within the time provided by Rule 5, the appeal is subject to dismissal (1) under this rule if the appellee shall file a proper certificate prior to the docketing of such record on appeal or (2) under Rule 48 by the Court of Appeals on its own motion. *State v. Garnett*, 4 N.C. App. 367, 167 S.E.2d 63 (1969).

Applied in *State v. Carroll*, 8 N.C. App. 336, 174 S.E.2d 138 (1970).

Cited in *Ross v. Sampson*, 4 N.C. App. 270, 166 S.E.2d 499 (1969); *Fetherbay v. Sharpe Motor Lines*, 8 N.C. App. 58, 173 S.E.2d 539 (1970); *State v. Daughtry*, 8 N.C. App. 318, 174 S.E.2d 76 (1970).

18. Appeal Docketed and Dismissed Not to Be Reinstated Until Appellant Has Paid Costs.

When an appeal is dismissed by reason of the failure of the appellant to bring up a record on appeal as provided in Rule 5 and Rule 17, no order shall be made setting aside the dismissal or allowing the appeal to be reinstated, even though the appellant may be otherwise entitled to such order, until the appellant has paid to the clerk of this Court for the use and benefit of the appellee the costs of the appellee in procuring the certificate and in causing the same to be docketed and the appeal dismissed.

Cited in *Richardson v. Shermer*, 3 N.C. App. 588, 165 S.E.2d 342 (1969).

19. Record on Appeal.

(a) *What to Contain and How Arranged.* In every record on appeal brought to this Court the trial tribunal and the presiding Judge shall be identified, the appealing party shall be identified, and proceedings shall be set forth in the order of the time in which they occurred, and the processes, orders, and documents included in the record on appeal shall be identified by their title or heading, and shall be arranged to follow each other in the order that they were filed. Every pleading, motion, affidavit, or other document included in the record on appeal shall plainly show the date on which it was filed and, if verified, the date of the verification and the name of the person who verified it. Every order, judgment, decree, and determination shall show the date on which it was signed and the date on which it was filed.

The pleadings on which the case was tried, the issues, and the order, judgment, decree, or determination appealed from shall be included in the record on appeal in all cases, and the charge of the Court where there is exception thereto. It shall not be necessary to include any affidavits, orders, processes, or documents not required for an understanding of the exceptions relied on, provided counsel so agree in writing, and such agreement is included; but, in the event of disagreement of counsel, the trial tribunal shall designate by written order what shall be included in the record on appeal.

This rule is subject to the power of this Court, in its discretion, to order additional parts of the record or proceedings to be sent up, and added to the record on appeal.

The pages of the record on appeal shall be numbered, and on the front thereof there shall be an index.

(b) *Two Appeals.* When there are two or more appeals in one action, only one copy of the record and the proceedings of the trial in the trial tribunal shall be necessary. In the event counsel cannot agree, the trial tribunal shall determine which of the methods described in Rule 19 (d) shall be followed, who is to prepare it, and the part of the costs to be advanced by each appealing party.

(c) *Exceptions Grouped.* All exceptions relied on shall be grouped and separately numbered immediately before the signature to the record on appeal. Exceptions not thus set out will be deemed to be abandoned.

(d) *Evidence—How Stated.* The evidence in case on appeal shall be in narrative form, and not by question and answer, except that a question and answer, or a series of them, may be set out when the subject of a particular exception. When this rule is not complied with, this Court will, in its discretion, hear the appeal, dismiss the appeal or remand for a settlement of the case on appeal to conform to this rule. The stenographic transcript of the evidence in the trial court may not be used as an alternative to narration of the evidence.

(e) *Agreed Statement in Lieu of Record.* When the questions presented by an appeal can be determined without an examination of all of the pleadings, evidence,

and proceedings in the trial tribunal, the parties may prepare and sign a statement of the case showing how the questions arose and were decided in the trial tribunal and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the questions by the appellate court. The statement may include or have annexed thereto such portions of the stenographic transcript of the testimony as the parties may desire. The statement may also include a designation by each of the parties of such portions of the original record below as they may desire to have presented to this Court. The statement shall include a copy of the judgment appealed from, and a concise statement of the points to be relied on by the appellant, and within twenty days of the filing of the notice of appeal, shall be presented to the trial tribunal for approval. The trial tribunal shall approve or disapprove the statement within ten days after its submission. If the statement conforms to the truth, it, together with such additions as the trial tribunal may consider necessary fully to present the questions raised by the appeal, shall be approved by the trial tribunal and shall then, together with such portions of the original record as may have been designated by the parties, be certified to this Court as the record on appeal.

(f) *Statement When No Stenographic Record Was Made.* In the event no stenographic record of the evidence or proceedings at a hearing or trial was made, the appellant shall, within ten days of the filing of the notice of appeal, prepare and serve on the respondent a statement of the evidence and proceedings from the best available sources, including his recollection, for use instead of a stenographic transcript. The respondent may serve objections or propose amendments thereto within ten days after service upon him. Thereupon the statement with the objections or proposed amendments, shall be submitted within ten days by the appellant to the trial tribunal for settlement and as settled and approved shall be included in the record on appeal. The trial tribunal shall settle the statement within ten days after its submission.

Note.—This rule does not apply to the cases referred to in G.S. 7A-195. See Rule 19 (g).

(g) *Appeals Involving Juvenile Cases.* In all appeals from the district courts in cases involving juveniles, pursuant to G.S. 7A-277 through G.S. 7A-289, these rules shall apply, with the exception that when the evidence is not recorded and transcribed, and notice of appeal is given in such case, the district court judge shall, within ten days after the notice of appeal is given, summarize the evidence and make findings of fact as required by the statute.

(h) *Unnecessary Portions of Record on Appeal—How Taxed.* The cost of copying and printing unnecessary and irrelevant matter not needed to explain the exceptions or errors assigned shall in all cases be charged to the appellant, unless it appears that they were sent up at the instance of the appellee, in which case the cost shall be taxed against him.

(i) *Records in Pauper Appeals.* See Rule 22.

(j) *Maps.* Three copies of every map, photograph, diagram, or other exhibit, which is a part of the record on appeal, and which is applicable to the merits of the appeal, shall be filed with the clerk of this Court before such appeal is called for argument: Provided, however, the Court of Appeals may authorize a lesser number to be filed.

(k) *Appeal Bond.* See Rule 6 (a).

(l) The prosecution bond given in every case shall be sent up with the record on appeal. Such bond shall be justified and the justification shall name the county wherein the surety resides.

Editor's Note.—The amendment adopted rewrote subsection (d), which formerly Feb. 11, 1969, and effective July 1, 1969, was composed of subdivisions (1) and (2)

and permitted use of the complete stenographic transcript as an alternative method. The amendment applies to all appeals docketed for hearing in the Court of Appeals at the Fall Term 1969 and thereafter.

The amendment adopted Aug. 23, 1968, inserted "or other exhibit" near the beginning of subsection (j) and added the proviso at the end of that subsection.

The amendment adopted May 19, 1970, substituted "G.S. 7A-277 through G.S. 7A-289" for "G.S. 7A-195" in subsection (g), substituted "the evidence is not recorded and transcribed, and notice of appeal is given in such case" for "notice of an appeal is given in such cases" therein and substituted "after the notice of appeal is given" for "thereafter" in that subsection.

The appellate court is bound by the contents of the record on appeal. *State v. Hickman*, 2 N.C. App. 627, 163 S.E.2d 632 (1968).

The record on appeal imports verity. *State v. Hickman*, 2 N.C. App. 627, 163 S.E.2d 632 (1968).

The record on appeal should consist of a plain, accurate, and concise statement of what the record shows occurred in the trial court, compiled and presented in the order prescribed and pursuant to this rule. *State v. Hickman*, 2 N.C. App. 627, 163 S.E.2d 632 (1968).

A brief is not a part of the record on appeal. *Civil Serv. Bd. v. Page*, 2 N.C. App. 34, 162 S.E.2d 644 (1968); *Tractor & Auto Supply Co. v. Fayetteville Tractor & Equip. Co.*, 2 N.C. App. 531, 163 S.E.2d 510 (1968).

Subsection (a) requires that the charge of the trial court be included in the record on appeal in all cases "where there is exception thereto." *State v. Hitchcock*, 4 N.C. App. 676, 167 S.E.2d 545 (1969).

Where two or more cases are consolidated and tried together as one case and there are two or more appeals arising from the action, ordinarily only one copy of the record and the proceedings of the trial in the trial tribunal should be filed in this Court. *State v. Tyler*, 4 N.C. App. 682, 167 S.E.2d 509 (1969).

Appendix.—Without the aid of the required appendix to appellant's brief, the Court of Appeals is required to search the entire transcript, much of which is not pertinent to the question raised on the appeal, in order to determine the correctness of the trial court's ruling. *Parsons v. Ussery*, 4 N.C. App. 96, 165 S.E.2d 669 (1969).

Stenographers are a helpful aid, but are not indispensable. *State v. Allen*, 4 N.C. App. 612, 167 S.E.2d 505 (1969).

Stenographer's Notes.—The stenographer's notes will be of valuable aid to refresh his memory, but the stenographer does not displace the judge in any of his functions. *State v. Allen*, 4 N.C. App. 612, 167 S.E.2d 505 (1969).

Stenographer's notes are not the compelling and supreme authority as to what transpired during the trial. The judge in charging the jury, always tells them that their recollection, and not that of the court itself, must govern them as to what was the testimony of the witnesses. And in settling the cases on appeal the first authority is that of counsel themselves in agreeing as to what occurred at the trial as to the evidence, as to the charge, and otherwise, and when they do not agree the judge must settle what really occurred. *State v. Allen*, 4 N.C. App. 612, 167 S.E.2d 505 (1969).

Stenographic notes will be of great weight with the judge, but are not conclusive if he has reason to believe there was error or mistake. The stenographer cannot take the place of the judge who is alone authorized and empowered by the Constitution to try the cause, and who alone if counsel disagree can settle for the court what occurred during the trial. *State v. Allen*, 4 N.C. App. 612, 167 S.E.2d 505 (1969).

Only one copy of the stenographic transcript is required to be filed. *Bryant v. Snyder*, 3 N.C. App. 65, 164 S.E.2d 35 (1968).

A statement of case on appeal is not an essential part of the record on appeal. *Moss v. Southern Ry.*, 2 N.C. App. 50, 162 S.E.2d 633 (1968).

Duties of Attorney General and Solicitor as to Case on Appeal.—See *State v. Hickman*, 2 N.C. App. 627, 163 S.E.2d 632 (1968).

Exceptions not filed in the record are deemed abandoned. *Cline v. Cline*, 6 N.C. App. 523, 170 S.E.2d 645 (1969).

Effect of Absence of Assignments of Error.—Where the record and brief contain no assignments of error as required by this rule and Rule 28, only the face of the record proper is presented for review. *Bumgarner & Bowman Bldg., Inc. v. Hollar*, 7 N.C. App. 14, 171 S.E.2d 60 (1969).

A sole assignment of error to the signing of a judgment presents the face of the record proper for review, but review is limited to the question of whether error of law appears on the face of the record, which includes whether the facts found or admitted support the judgment, and

whether the judgment is regular in form. *In re Morrison*, 6 N.C. App. 47, 169 S.E.2d 228 (1969).

Failure to State Evidence in Narrative Form.—An appeal is dismissed for failure of the defendants to state the evidence in narrative form. *State v. Benfield*, 8 N.C. App. 103, 174 S.E.2d 57 (1970).

Record Not Containing Evidence. — When the evidence adduced at the trial is not contained in the record, the appeal must be dismissed in the absence of error appearing upon the face of the record. *State v. Benfield*, 8 N.C. App. 103, 174 S.E.2d 57 (1970).

Insufficient Statement of Evidence. — Where it is impossible for the Court to determine from whom the evidence was being elicited, who was examining the witnesses, whether there was cross-examination, the purpose for which the witnesses were being examined, and exactly what the evidence was, the recital, rather than being a narration of the evidence, is a recitation of the events surrounding the arrest of the defendants. *State v. Benfield*, 8 N.C. App. 103, 174 S.E.2d 57 (1970).

Order of Proceedings and Documents.—The record does not comply with this rule where the proceedings are not set forth therein in the order of time in which they occurred and are not arranged so as to follow each other in the order in which they were filed, and the documents included in the record do not plainly show the date on which they were filed. *Garner v. State*, 8 N.C. App. 109, 174 S.E.2d 92 (1970).

Applied in *State v. Jiles*, 1 N.C. App. 137, 160 S.E.2d 125 (1968); *Crosby v. Crosby*, 1 N.C. App. 398, 161 S.E.2d 654 (1968); *White v. Hester*, 1 N.C. App. 410, 161 S.E.2d 611 (1968); *Bost v. Citizens Nat'l Bank*, 1 N.C. App. 470, 162 S.E.2d 158 (1968); *State v. Mitchell*, 1 N.C. App. 528, 162 S.E.2d 94 (1968); *Yates v. Hajoca*

Corp., 1 N.C. App. 553, 162 S.E.2d 119 (1968); *Buffkin v. Gaskin*, 1 N.C. App. 563, 162 S.E.2d 164 (1968); *Murrell v. Poole*, 1 N.C. App. 584, 162 S.E.2d 121 (1968); *Ring v. Ring*, 1 N.C. App. 592, 162 S.E.2d 126 (1968); *Shephard v. North Carolina State Highway Comm'n*, 2 N.C. App. 223, 162 S.E.2d 520 (1968); *State v. Wilson*, 3 N.C. App. 225, 164 S.E.2d 546 (1968); *In re Burchette*, 3 N.C. App. 575, 165 S.E.2d 564 (1969); *State v. Blount*, 4 N.C. App. 561, 167 S.E.2d 444 (1969); *Kearns v. Kearns*, 6 N.C. App. 319, 170 S.E.2d 132 (1969); *State v. Wooten*, 6 N.C. App. 628, 170 S.E.2d 508 (1969); *Craven v. Dimmette*, 8 N.C. App. 75, 173 S.E.2d 647 (1970).

Quoted in *Inman v. Harper*, 2 N.C. App. 103, 162 S.E.2d 629 (1968); *State v. Cotten*, 2 N.C. App. 305, 163 S.E.2d 100 (1968); *Summey v. McDowell*, 4 N.C. App. 62, 165 S.E.2d 768 (1969); *State v. Ellis*, 4 N.C. App. 514, 167 S.E.2d 35 (1969).

Stated in *State v. Willis*, 4 N.C. App. 641, 167 S.E.2d 518 (1969); *State v. Huffman*, 8 N.C. App. 85, 173 S.E.2d 636 (1970).

Cited in *State v. Fowler*, 1 N.C. App. 552, 162 S.E.2d 36 (1968); *State v. Evans*, 1 N.C. App. 603, 162 S.E.2d 97 (1968); *State v. Stanley*, 1 N.C. App. 628, 162 S.E.2d 123 (1968); *State v. Martin*, 2 N.C. App. 148, 162 S.E.2d 667 (1968); *State v. Mercer*, 2 N.C. App. 152, 162 S.E.2d 563 (1968); *State v. Green*, 2 N.C. App. 170, 162 S.E.2d 641 (1968); *Hodge v. Robertson*, 2 N.C. App. 216, 162 S.E.2d 594 (1968); *State v. Waddell*, 3 N.C. App. 58, 164 S.E.2d 75 (1968); *Richardson v. Shermer*, 3 N.C. App. 588, 165 S.E.2d 342 (1969); *State v. Cline*, 4 N.C. App. 112, 165 S.E.2d 691 (1969); *Elmore v. Elmore*, 4 N.C. App. 192, 166 S.E.2d 506 (1969); *State v. Barnes*, 4 N.C. App. 446, 167 S.E.2d 76 (1969); *Cook v. Cook*, 5 N.C. App. 652, 169 S.E.2d 29 (1969).

20. Pleadings.

(a) *When Deemed Frivolous.* Memoranda of pleadings will not be received or recognized in the Court of Appeals as pleadings, even by consent of counsel, but the same will be treated as frivolous and impertinent.

(b) *When Scandalous.* Pleadings containing scandalous or impertinent matter will, in a plain case, be ordered by the Court to be stricken from the record, or reformed; and for this purpose the Court may refer it to the clerk, or some member of the bar, to examine and report the character of the same.

(c) *Amendment.* This Court may amend any process, pleading, or proceedings, either in form or substance, for the purpose of furthering justice, on such terms as shall be deemed just, at any time before final determination by this Court, or may make proper parties to any case, where the Court may deem it necessary and

proper for the purpose of justice, and on such terms as the Court may prescribe, at any time before final determination by this Court.

Cited in *Moss v. Southern Ry.*, 2 N.C. App. 50, 162 S.E.2d 633 (1968); *Yancey v. Watkins*, 2 N.C. App. 672, 163 S.E.2d 625 (1968); *Elmore v. Elmore*, 4 N.C. App. 192, 166 S.E.2d 506 (1969).

21. Exceptions. (See also Rule 19 (c)).

When appellant is required to serve a record on appeal, he shall set out in his statement of record on appeal his exceptions to the proceedings, ruling, or judgment of the court, briefly and clearly stated and numbered. When record on appeal is not required to be served, appellant shall file said exceptions in the office of the clerk or comparable officer of the trial tribunal, within ten days next after the entry of the judgment, order, decree, or determination, on or after the end of the session at which judgment is rendered, from which the appeal is taken, or in case of a ruling of the court in chambers and not during a session, within ten days after notice thereof. No exceptions not thus set out, or filed and made a part of the record on appeal, shall be considered by this Court, other than exceptions to the jurisdiction, or because the complaint does not state a cause of action, or motions in arrest for the insufficiency of an indictment.

Voyage of Discovery Not Required.—

It would require a tedious and time-consuming voyage of discovery for the reviewing court to ascertain upon what the appellant is relying to show error, and the rules and decisions do not require the court to make any such voyage. *State v. Hitchcock*, 4 N.C. App. 676, 167 S.E.2d 545 (1969).

An assignment of error must be based on an exception duly noted. *State v. Hitchcock*, 4 N.C. App. 676, 167 S.E.2d 545 (1969).

An assignment of error is ineffectual if not based on a proper exception. *Bost v. Citizens Nat'l Bank*, 1 N.C. App. 470, 162 S.E.2d 158 (1968).

Court Will Not Consider Error Not Subject of Exception or Assignment. — The Court of Appeals will not consider an error in the charge and the evidence which has not been made the subject of an exception or assignment of error. *State v. Moore*, 6 N.C. App. 596, 170 S.E.2d 568 (1969).

Exceptions not duly noted and appearing only under the purported assignments of error will not be considered. *Midgett v. Midgett*, 5 N.C. App. 74, 168 S.E.2d 53 (1969).

An appeal itself is an exception to the judgment which presents for review error appearing on the face of the record. *State v. Hitchcock*, 4 N.C. App. 676, 167 S.E.2d 545 (1969).

Applied in *State v. Lane*, 1 N.C. App. 539, 162 S.E.2d 149 (1968); *State v. Wilson*, 3 N.C. App. 225, 164 S.E.2d 546 (1968); *State v. Wooten*, 6 N.C. App. 628, 170 S.E.2d 508 (1969).

Cited in *State v. Green*, 2 N.C. App. 170, 162 S.E.2d 641 (1968); *State v. Waddell*, 3 N.C. App. 58, 164 S.E.2d 75 (1968); *State v. Austin*, 4 N.C. App. 481, 167 S.E.2d 10 (1969); *State v. Battle*, 4 N.C. App. 588, 167 S.E.2d 476 (1969).

22. Printing (Record on Appeal). (But see Rule 25).

Twenty-five copies of the record on appeal in every case docketed, except in pauper appeals, shall be printed and filed immediately after the case has been docketed, unless printed before the case has been docketed, in which event the printed copies shall be filed when the case is docketed. It shall not be necessary to print the summons and other papers showing service of process, if a statement signed by counsel is printed giving the names of all the parties and stating that summons has been duly served. Nor shall it be necessary to print formal parts of the record showing the organization of the court, the constitution of the jury, etc.

In pauper appeals the counsel for appellant may file nine legible typewritten copies of his brief, in lieu of printed copies, if he so elects, and such briefs must give a succinct statement of the facts applicable to the exceptions and the authorities relied on, and in pauper appeals the appellant may also file, in lieu of printed

copies, if he so elects, nine legible typewritten copies of the record on appeal, in addition to the original record on appeal. Should the appellant prevail, the cost of preparing the typewritten briefs and record on appeal shall be taxed against the appellee, provided receipted statement of such cost is given the clerk of this Court before the case is decided. When any party to an action tried and determined in any trial tribunal desires to appeal as a pauper from the judgment rendered therein to the Appellate Division of the General Court of Justice, the provisions of G.S. 1-288 shall be followed, where applicable; and the terms "judge" or "clerk" used therein, referring to the superior courts, shall be deemed to mean the presiding official of the trial tribunal. The preceding sentence shall not apply to appeals in forma pauperis in criminal actions.

The arrangement of the matter in the printed record on appeal shall follow the order prescribed by Rule 19.

Editor's Note.—The amendment adopted Oct. 1, 1968, added the last two sentences in the second paragraph.

23. How Printed.

The record on appeal, except the stenographic transcript referred to in Rule 19 (d) (2), shall be printed under the direction of the clerk of this Court, and in the same type and style, and pages of same size as the reports of this Court, unless it is printed before the appeal is docketed in the required style and manner. If it is to be printed here, the appellant or the party sending up the appeal shall send therewith to the clerk of this Court a cash deposit, sufficient to cover the cost of printing, which shall include ten cents per page for preparing the record on appeal in proper shape for the printer.

When it appears that the clerk has waived the requirement of a cash deposit by appellant to cover estimated cost of printing, and the cost of printing has not been paid when the case is called for argument, the Court will in its discretion, on motion of counsel for appellee or a statement made by the clerk, dismiss the appeal.

24. Appeal Dismissed if Record on Appeal Not Properly Reproduced.

If the record on appeal (except in pauper appeals and except the stenographic transcript referred to in Rule 19 (d) (2)) shall not be properly reproduced as required by the rules, by reason of the failure of the appellant to send up the record on appeal, or deposit the cost therefor, in time for it to be properly reproduced when called in its regular order (as set out in Rule 5), the appeal shall, on motion of appellee, be dismissed; but the Court may, on motion of appellant, after five days' notice, at the same session for good cause shown, reinstate the appeal, to be heard at the next session. When a case is called and the record on appeal is not fully and properly reproduced, if the appellee does not move to dismiss, the case will be continued.

25. Mimeographed Records and Briefs.

Counsel may file with the clerk of this Court in lieu of printed records on appeal and briefs twenty-five mimeographed copies thereof, to be prepared as provided in Rule 25 of the Rules of Practice in the Supreme Court.

25½. Alternate Method of Reproducing Records and Briefs.

Subject to the approval of the Chief Justice of the Supreme Court, the Administrative Officer of the Courts may provide for an alternate method of reproducing records on appeal and briefs, utilizing current equipment and techniques.

26. Cost of Reproducing Records on Appeal and Briefs to Be Recovered.

The actual cost of reproducing the record on appeal and of the brief shall be allowed the successful litigant, not to exceed \$1.50 per page, and not exceeding sixty pages for a record on appeal and twenty pages for a brief, unless otherwise specially ordered by the Court, and he shall be allowed ten cents additional for each such page paid to the clerk of this Court for making copy for the printer, unless the record on appeal was printed before the case was docketed; provided, receipted statement of such cost is given the clerk before the case is decided. In pauper appeals the actual cost of preparing typewritten copies of the record on appeal and of the brief shall be allowed the appellant, not to exceed twenty-five cents per page, and not to exceed sixty pages for record on appeal and twenty pages for brief.

Judge and counsel should not encumber the record on appeal with evidence or with matters not pertinent to the exceptions taken. When the record on appeal is settled, either by the judge or the parties, if either party deems that unnecessary matter is incorporated, he shall have his exception noted, designating the parts deemed unnecessary, and if upon hearing the appeal, the Court finds that such parts were in fact unnecessary, the cost of reproducing such unnecessary matter shall be taxed against the party at whose instance it was done, no matter in whose favor the judgment is given here, except when such party has already paid the expense of such unnecessary matter, and in that event he shall not recover it back, though successful on his appeal. Motions for taxation of costs for reproducing unnecessary parts sent up in the record on appeal shall be decided without argument.

Cited in *Elmore v. Elmore*, 4 N.C. App. 192, 166 S.E.2d 506 (1969).

27. Briefs.

Twenty-five copies of briefs of both parties shall be filed in all cases (except in pauper appeals, as provided in Rule 22). Such briefs may be sent up by counsel ready printed, or they may be printed or reproduced as provided by these rules if a proper deposit for cost is made, as specified in Rule 23. They must be of the size and style prescribed by such rule. The briefs are expected to cover all the points presented in the oral argument, though additional authorities may be cited, if discovered after brief is filed, by furnishing list to opposing counsel and handing memorandum of same to the clerk to be placed by him with the papers in the case, but counsel will not be permitted to consume time on the argument in the citation of additional authorities.

Cited in *Norfolk S. Ry. v. Horton*, 3 N.C. App. 383, 165 S.E.2d 6 (1969); *State v. Rogers*, 7 N.C. App. 572, 172 S.E.2d 883 (1970).

27½. Statement of the Questions Involved.

The first page of appellant's brief, other than formal matters appearing thereon, shall be used exclusively for a succinct statement of the question or questions involved on the appeal. Such statement should not ordinarily exceed fifteen lines, and should never exceed one page. This will then be followed on the next page by a recital of the facts and the argument as required by the other rules. In case of disagreement as to the exact question or questions presented for determination, the appellee may submit a counter-statement, using the first page of appellee's brief for this purpose. But no counter-statement need be made unless appellee thinks appellant's statement is inaccurate, or that it does not present the points for decision in a proper light.

The statement of the questions involved or presented by the appeal, is designed to enable the Court, as well as counsel, to obtain an immediate view and grasp of the nature of the controversy; and a failure to comply with this rule may result in a dismissal of the appeal.

Cited in *State v. Tipton*, 8 N.C. App. 53, 173 S.E.2d 527 (1970).

28. Appellant's Brief.

The brief of appellant shall set forth a succinct statement of the facts necessary for understanding the exceptions. As to an exception that there was no evidence, it shall be sufficient to refer to pages of the record containing the evidence. Such brief shall contain, properly numbered, the several grounds of exception and assignment of error with reference to the pages of the record, and the authorities relied on classified under each assignment; and if statutes are material, the same shall be cited by the book, chapter, and section. Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him. Such briefs when filed shall be noted by the clerk on the docket, and when reproduced a copy thereof furnished by him to appellee's counsel.

Appellant shall, upon filing a copy of his brief to be reproduced, on the same date mail or deliver to appellee's counsel a copy thereof. If the appellant's brief has not been filed with the clerk of this Court, and no copy has been mailed or delivered to appellee's counsel by 12:00 o'clock noon on the third Tuesday preceding the call of the district to which the case belongs, the appeal will be dismissed on motion of appellee, when the call of that district is begun, unless for good cause shown the court shall give further time to file the brief.

A failure to comply with this rule results in a failure to present for review the questions sought to be presented. *State v. Black*, 7 N.C. App. 324, 172 S.E.2d 217 (1970).

Strict Numerical Order Not Essential.—It is not essential that the assignments of error be argued in the brief in strict numerical order, but certainly counsel should indicate which assignment of error he proposes that the argument supports. In *re Will of Head*, 1 N.C. App. 575, 162 S.E.2d 137 (1968).

Failure to File Brief.—Failure by appellant to file a brief works an abandonment of his assignments of error, except those appearing upon the face of the record proper, which are cognizable *ex mero motu*. *Land v. Land*, 4 N.C. App. 115, 165 S.E.2d 692 (1969).

Appellant's exceptions and assignments of error are deemed abandoned where appellant fails to file a brief as required by this rule. In *re Custody of Maxwell*, 7 N.C. App. 59, 171 S.E.2d 20 (1969).

An appeal is subject to dismissal for failure of claimants to file their brief within the time allowed by the Rules of the Court of Appeals. *Fetherbay v. Sharpe Motor Lines*, 8 N.C. App. 58, 173 S.E.2d 589 (1970).

Assignments of error not brought forward and argued in the brief are deemed

abandoned. *Goldston v. Lynch*, 2 N.C. App. 291, 163 S.E.2d 26 (1968); *Brantley v. Sawyer*, 5 N.C. App. 557, 169 S.E.2d 55 (1969); *State v. Clontz*, 6 N.C. App. 587, 170 S.E.2d 624 (1969); *State v. Corn*, 6 N.C. App. 613, 170 S.E.2d 544 (1969); *Atkins v. Parker*, 7 N.C. App. 446, 173 S.E.2d 38 (1970); *Moody v. Lundy Packing Co.*, 7 N.C. App. 463, 172 S.E.2d 905 (1970); *Tickle v. Standard Insulating Co.*, 8 N.C. App. 5, 173 S.E.2d 491 (1970); *State v. Tipton*, 8 N.C. App. 53, 173 S.E.2d 527 (1970); *State v. Chisholm*, 8 N.C. App. 80, 173 S.E.2d 635 (1970); *State v. Jordan*, 8 N.C. App. 203, 174 S.E.2d 112 (1970).

If an appellant's assignment of error is not brought forward in his brief, it is deemed abandoned. *State v. Bass*, 5 N.C. App. 429, 168 S.E.2d 424 (1969).

Assignments of error not set out in the brief are deemed abandoned. *State v. Gaiten*, 8 N.C. App. 66, 173 S.E.2d 646 (1970).

An assignment of error for which no argument is set forth nor authority cited in defendant's brief is deemed abandoned. *State v. Johnson*, 5 N.C. App. 469, 168 S.E.2d 709 (1969).

Exceptions and assignments of error for which no reason or argument is stated or authority cited in appellant's brief are deemed abandoned. *State v. Brown*, 7 N.C. App. 372, 172 S.E.2d 99 (1970).

An assignment of error is deemed abandoned where no reason or argument is stated or authority cited in support thereof in appellant's brief. *State v. Pulley*, 5 N.C. App. 285, 168 S.E.2d 62 (1969).

Assignments of error are deemed abandoned where no reference, argument or citation relating thereto is brought forward in the brief. *State v. Paschal*, 6 N.C. App. 334, 170 S.E.2d 95 (1969).

Exceptions and assignments of error not set out in appellant's brief are deemed abandoned. *Harwell Enterprises, Inc. v. Heim*, 6 N.C. App. 548, 170 S.E.2d 540 (1969).

Assignments of error not supported by reason or authority in defendant's brief will be deemed abandoned. *State v. Norman*, 8 N.C. App. 239, 174 S.E.2d 41 (1970).

Assignment of error not brought forward and discussed in appellant's brief is deemed abandoned. *Hagins v. Redevelopment Comm'n*, 1 N.C. App. 40, 159 S.E.2d 584 (1968).

Assignments of error in support of which no argument is advanced and no authority is cited are deemed abandoned. *Somerset v. Somerset*, 3 N.C. App. 473, 165 S.E.2d 33 (1969).

Exceptions in the record not set out in defendant's brief nor supported by argument or citation of authority will be taken as abandoned by defendant. *State v. Kirby*, 7 N.C. App. 366, 172 S.E.2d 93 (1970).

An exception not argued in appellant's brief is deemed abandoned. In re *Whichard*, 8 N.C. App. 154, 174 S.E.2d 281 (1970).

Exceptions are deemed abandoned where no argument or citation of authority is brought forward in their support. *State ex rel. Utilities Comm'n v. Morgan*, 7 N.C. App. 576, 173 S.E.2d 479 (1970).

Where the record and brief contain no assignments of error as required by this rule and Rule 19 (c), only the face of the record proper is presented for review. *Bumgarner & Bowman Bldg., Inc. v. Hollar*, 7 N.C. App. 14, 171 S.E.2d 60 (1969).

An appeal is subject to dismissal where both the record on appeal and the appellant's brief contain no assignments of error but list or refer only to the exceptions. In re *Whichard*, 8 N.C. App. 154, 174 S.E.2d 281 (1970).

An appeal is subject to dismissal for

29. Appellee's Brief.

The appellee shall file a copy of his brief to be reproduced, or twenty-five printed copies thereof, with the clerk of this Court by noon of the Second Tuesday preceding the call of the district to which the case belongs and on the same date mail or deliver to appellant's counsel a copy, and the filing thereof shall be noted by the clerk on his docket and when reproduced, a copy furnished by the clerk

failure to comply with this rule where defendant failed to bring forward in her brief any of the questions preserved in the assignments of error. *State v. Eaton*, 8 N.C. App. 321, 174 S.E.2d 24 (1970).

A broadside reference to the errors assigned by counsel does not conform with this rule. *Seibold v. Mutual Benefit Health & Accident Ass'n*, 8 N.C. App. 277, 174 S.E.2d 25 (1970).

Applied in *State v. Lewis*, 1 N.C. App. 296, 161 S.E.2d 497 (1968); *State v. Colson*, 1 N.C. App. 339, 161 S.E.2d 637, aff'd, 274 N.C. 295, 163 S.E.2d 376 (1968); *Bost v. Citizens Nat'l Bank*, 1 N.C. App. 470, 162 S.E.2d 158 (1968); *State v. Lane*, 1 N.C. App. 539, 162 S.E.2d 149 (1968); *State v. Jetton*, 1 N.C. App. 567, 162 S.E.2d 102 (1968); *State v. Martin*, 2 N.C. App. 148, 162 S.E.2d 667 (1968); *First-Citizens Bank & Trust Co. v. Berry*, 2 N.C. App. 547, 163 S.E.2d 505 (1968); *State v. Wilson*, 3 N.C. App. 225, 164 S.E.2d 546 (1968); *State v. Hogsed*, 3 N.C. App. 481, 165 S.E.2d 18 (1969); In re *Burchette*, 3 N.C. App. 575, 165 S.E.2d 564 (1969); *Richardson v. Shermer*, 3 N.C. App. 588, 165 S.E.2d 342 (1969); *Simmons v. Edwards*, 3 N.C. App. 591, 165 S.E.2d 345 (1969); *Rector v. Rector*, 4 N.C. App. 240, 166 S.E.2d 492 (1969); *Piney Mountain Properties v. National Theatre Supply*, 4 N.C. App. 334, 166 S.E.2d 840 (1969); *Midgett v. Midgett*, 5 N.C. App. 74, 168 S.E.2d 53 (1969); *State v. Mitchell*, 6 N.C. App. 755, 171 S.E.2d 74 (1969); *State v. Britt*, 8 N.C. App. 262, 174 S.E.2d 69 (1970).

Quoted in *Academy of Dance Arts v. Bates*, 1 N.C. App. 333, 161 S.E.2d 762 (1968); *State v. Willis*, 4 N.C. App. 641, 167 S.E.2d 518 (1969).

Cited in *State v. Colson*, 274 N.C. 295, 163 S.E.2d 376 (1968); *Angle v. Black*, 1 N.C. App. 36, 159 S.E.2d 254 (1968); *State v. Lynch*, 1 N.C. App. 248, 161 S.E.2d 61 (1968); *State v. Huffstetler*, 1 N.C. App. 405, 161 S.E.2d 617 (1968); *State v. Mercer*, 2 N.C. App. 152, 162 S.E.2d 563 (1968); *State v. Blount*, 4 N.C. App. 561, 167 S.E.2d 444 (1969); *State v. Rogers*, 7 N.C. App. 572, 172 S.E.2d 883 (1970); *Dale v. Dale*, 8 N.C. App. 96, 173 S.E.2d 643 (1970).

to counsel for appellant. It is not required that the appellee's brief shall contain a statement of the case. On failure of the appellee to file his brief by the time required, the cause will be heard and determined without argument from the appellee unless for good cause shown the Court shall give appellee further time to file his brief.

Applied in *State v. Black*, 7 N.C. App. 324, 172 S.E.2d 217 (1970).

30. Arguments.

(a) Counsel for the appellant shall be entitled to open and conclude the argument.

(b) Counsel for appellant may be heard ten minutes for statement of case and twenty-five minutes in argument.

(c) Counsel for appellee may be heard for twenty-five minutes.

(d) The time allowed for argument may be extended by the Court in a case requiring such extension, but application for extension must be made before the argument begins. The Court, however, may direct the argument of such points as it may see fit outside of the time limited.

(e) Any number of counsel may be heard on either side within the time limitations herein specified, but if more than one counsel is to be heard, each must confine himself to a part or parts of the subject matter involved in the exceptions not discussed by his associate counsel, unless otherwise directed by the Court, in order to avoid tedious and useless repetition.

31. Rearguments.

The Court will, of its own motion, direct a reargument before deciding any case, if in its judgment it is desirable.

Cited in *State Highway Comm'n v. Mat-* (1968); *State Highway Comm'n v. Mode*, this, 2 N.C. App. 233, 163 S.E.2d 35 2 N.C. App. 464, 163 S.E.2d 429 (1968).

32. Agreement of Counsel.

The Court will not recognize any agreement of counsel in any case unless the same shall appear in the record, or in writing filed in the cause in this Court.

33. Appearances.

An attorney shall not be recognized as appearing in any case unless he be entered as counsel of record in the case. Upon his request, the clerk shall enter the name of such attorney, or he may enter it himself, thereby making him counsel of record for the party he may designate therein. Such appearance of counsel shall be deemed to be general in the case, unless a different appearance be indicated. Counsel of record are not permitted to withdraw from a case, except by leave of the Court.

34. Certiorari and Supersedeas.

(a) *When Applied for.* Generally, the writ of certiorari, as a substitute for an appeal, must be applied for at the session of this Court to which the appeal ought to have been taken, or, if no appeal lay, then before or to the session of this Court next after the judgment complained of was entered in the trial tribunal. If the writ shall be applied for after that session, sufficient cause for the delay must be shown.

(b) *How Applied for.* The writs of certiorari and supersedeas shall be granted only upon petition, specifying the grounds of application therefor, except when a diminution of the record shall be suggested and it appears upon the face of the

record that it is manifestly defective, in which case the writ of certiorari may be allowed, upon motion in writing. In all other cases the adverse party may answer the petition. The petition and answer must be verified, and the application shall be heard upon the petition, answer, affidavit, and such other evidence as may be pertinent.

(c) *Notice of.* No such petition or motion in the application shall be heard unless the petitioner shall have given the adverse party ten days' notice, in writing, of the same; but the Court may, for just cause shown, shorten the time for such notice and the manner of giving such notice.

(d) *Copies of Transcript or Summary of Evidence in Certain Cases.* When a petition for certiorari is filed under the provisions of G.S. 15-222, two (2) copies of the complete transcript of the post-conviction proceedings, including the transcript of the questions and answers, or if there was no reporter present, a summary of the evidence from the presiding judge's notes, shall be filed with the petition.

35. Additional Issues.

If, pending the consideration of an appeal, the Court of Appeals shall consider the trial or finding of one or more issues of fact necessary to a proper decision of the case upon its merits, such issue shall be made up under the direction of the Court and certified to the trial tribunal for trial or finding and the case will be retained for that purpose.

36. Motions.

All motions made to the Court must be reduced to writing, and shall contain a brief statement of the facts on which they are founded, and the purpose of the same.

No personal appearance of counsel in open court shall be necessary for the purpose of filing a motion, and the motion will be considered filed when received by the clerk.

Motions filed in open court shall be tendered to the Court upon the opening of court on any day the Court is sitting to hear arguments.

Motions filed in this Court, whether in open court, with an individual judge, or by delivery to the clerk, shall show thereon the date and manner of notice to opposing parties or counsel.

Motions which in the opinion of this Court require argument will be calendared for argument by order of this Court; otherwise, motions will be determined by this Court in conference.

Stated in *State v. Lynch*, 1 N.C. App. 1 N.C. App. 94, 160 S.E.2d 117 (1968);
248, 161 S.E.2d 61 (1968). *Parsons v. Ussery*, 4 N.C. App. 96, 165

Cited in *Tew v. Durham Life Ins. Co.*, S.E.2d 669 (1969).

37. Abatement and Revivor.

Whenever, pending an appeal to this Court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in, and, on motion, be admitted to become parties to the action, and thereupon the appeal shall be heard and determined as in other causes; and if such representatives shall not so voluntarily become parties, then the opposing party may suggest the death upon the record, and thereupon, on motion, obtain an order that, unless such representatives shall become parties within the first five days of the ensuing session, the party moving for such order shall be entitled to have the appeal dismissed; or, if the party moving shall be the appellant, he shall be entitled to have the appeal heard and determined according to the course of the Court; provided, such order shall be served upon the opposing party.

When the death of a party is suggested, and the proper representatives of the deceased fail to appear by the fifth day of the session next succeeding such suggestion, and no action shall be taken by the opposing party within the time to compel their appearance, the appeal shall abate, unless otherwise ordered.

38. Certification of Decisions.

The clerk of this Court shall transmit to the clerk, or comparable officer, of the trial tribunal from which the appeal originated, certificates of the decisions of this Court on the second Monday after the written opinions of the Court are filed in his office, unless otherwise directed. The Court in its discretion may order an opinion certified at an earlier day. Upon final adjournment of a session of the Court, the clerk of this Court shall at once certify to the clerk, or comparable officer, of the trial tribunal, all of the decisions not theretofore certified. The clerk of this Court shall issue execution for all costs incurred in this Court, or by order of this Court.

39. Judgment and Minute Dockets.

The judgment docket of this Court shall contain an alphabetical index of the names of the parties in favor of whom and against whom any judgment for costs or judgment interlocutory or upon the merits is entered. On this docket the clerk of the Court will enter a brief memorandum of every final judgment affecting the right to real property, and of every judgment requiring, in whole or in part, the payment of money, stating the names of the parties, the session at which such judgment was entered, and its number on the docket of the Court. When it shall appear from the return on the execution, or from an order for entry of satisfaction by this Court, that the judgment has been satisfied, in whole or in part, the clerk at the request of any one interested in such entry, and on the payment of the lawful fee, shall make a memorandum of such satisfaction, whether in whole or in part, and refer briefly to the evidence of it.

The clerk shall keep a permanent book, in which he shall index and cross-index all motions, petitions and appeals disposed of.

40. Clerk and Commissioners.

The clerk and every commissioner of this Court, who, by virtue or under color of any order, judgment, or decree of the Court of Appeals in any action or matter pending therein, has received or shall receive any money or security for money, to be kept or invested for the benefit of any party to such action or matter, or of any other person, shall, at the session of said Court held next after the first day of January in each year, report to the Court a statement of said fund, setting forth the title and number of the action or matter, the session of the Court at which the order or orders under which the clerk or such commissioner professes to act was made, the amount and character of the investment, and the security for same, and his opinion as to the sufficiency of such security. In every subsequent report he shall state the condition of the fund and any change made in the amount or character of the investment, and every payment made to any person entitled thereto.

The reports required by the preceding paragraph shall be examined by the Court or some member thereof designated by the Chief Judge, and their or his approval endorsed shall be recorded in a well-bound book, kept for the purpose, in the office of the clerk of the Court of Appeals, entitled, "Record of Funds," and the cost of recording the same shall be allowed by the Court and paid out of the fund. The report shall be filed among the papers of the action or matter to which the fund belongs.

41. Court of Appeals Library.

Books Taken Out. No book belonging to the Court of Appeals Library shall be taken therefrom, except in the Court of Appeals chamber, unless by a Judge of the Court of Appeals, without the special permission of the Chief Judge of the Court, and then only upon an application in writing, and in such cases the Chief Judge shall require his secretary to enter in a book kept for the purpose the name of the person requiring the same, the name and number of the volume taken, when taken, and when returned. A copy of this rule shall be posted in the Library of the Court of Appeals.

42. Court's Opinions.

After a panel of the Court has decided a cause, the judge assigned to write the decision shall cause three typewritten copies thereof to be made and a copy sent to each member of the hearing panel, to the end that the same may be carefully examined, and the bearing of the authority cited may be considered prior to the day when the opinion shall be finally adopted by the hearing panel as the decision of the Court and ordered to be filed by the clerk.

43. Executions.

(a) *Teste of Executions.* When an appeal shall be taken after the commencement of a session of this Court, the judgment and teste of the execution shall have effect from the time of the filing of the appeal.

(b) *Issuing and Return of.* Executions issuing from this Court may be directed to the proper officers of any county in the State. At the request of a party in whose favor execution is to be issued, it may be made returnable on any specified day after the commencement of the session of this Court next ensuing its teste. In the absence of such request, the clerk shall, within thirty days after the certificate of decision is sent down, issue such execution to the county from which the cause came, making it returnable on the first day of the next ensuing session. The execution may, when the party in whose favor judgment is rendered shall so direct, be made returnable to the session of the appropriate trial tribunal held next after the date of its issue, and thereafter successive executions will only be issued from said trial tribunal, and when satisfied, the fact shall be certified to this Court, to the end that an entry to this effect be made here.

Executions for the cost of this Court, adjudged against the losing party to appeals, may be issued after the determination of the appeal, returnable to a subsequent day of the session; or they may be issued after the end of the session, returnable on a day named, at the next succeeding session of this Court.

The officer to whom said executions are directed shall be amenable to the penalties prescribed by law for failure to make due and proper return thereof.

44. Petition to Rehear.

(a) *When Filed.* Petitions to rehear must be filed within forty days after the filing of the decision in the case. No communication with the Court, or any Judge thereof, in regard to any such petition, will be permitted under any circumstances. No oral argument or other presentation of the cause to the Court, or any Judge thereof, by either party, will be allowed, unless on special request the Court shall so order.

(b) *What to Contain.* The petition must assign the alleged error of law complained of, or the matter overlooked, or the newly discovered evidence; and allege that the judgment complained of has been performed or secured. Such petition shall be accompanied with the certificate of at least two members of the bar of this Court, who have no interest in the subject matter and have not been of counsel

for either party to the suit, and each of whom shall have been at least five years a member of the bar of this Court, that they have carefully examined the case and the law bearing thereon and the authorities cited in the decision, and they shall summarize succinctly in such certificate the points in which they deem the decision erroneous.

(c) *One Copy to Be Filed, How Endorsed.* The petitioner shall endorse upon the petition, of which he shall file one copy, the name of the Judge to whom the petition shall be referred by the clerk, and in cases where there has been a dissent the name of the Judge so endorsed shall be the name of a Judge who did not dissent, and the case shall not be docketed for rehearing unless the Judge endorses thereon that it is a proper case to be reheard.

The clerk shall, upon the receipt of a petition to rehear, immediately deliver the copy to the Judge to whom it is to be referred, unless the petition is received during a vacation of the Court, in which event it shall be delivered to the Judge designated by the petitioner on the first day of the next succeeding session of Court.

(d) *Judge to Act in Thirty Days.* The clerk shall enter upon the rehearing docket and upon the petition the date when the petition is filed in the clerk's office, the name of the Judge to whom the petitioner has requested that the petition be referred, and also the date when the petition is delivered to the Judge. The Judge will act upon the petition within thirty days after it is delivered to him, and the clerk is directed to report in writing to the Chief Judge a list of all petitions to rehear not acted on within the time required.

(e) *New Briefs to Be Filed.* There shall be no oral argument before the Judge thus designated, before it is acted on by him, and if he orders the petition docketed, there shall be no oral argument thereon before the hearing panel of the Court (unless the hearing panel of its own motion shall direct an oral argument), but it shall be submitted on the record at the former hearing, the petition to rehear, and a brief to be filed by the petitioner within ten days after the petition is ordered to be docketed, and a brief to be filed by the respondent within twenty days after such order to docket. Such briefs shall not be the briefs on the first hearing, but shall be new briefs, directed to the errors assigned in the petition, and shall be reproduced as provided by the rules. If the brief is not filed within the prescribed time by the petitioner, the petition will be dismissed, and for similar default by the respondent, the cause will be disposed of without his brief.

(f) *When Petition Docketed for Rehearing.* The petition may be ordered docketed for a rehearing as to all points recited by the two certifying counsel (who cannot certify to errors not alleged in the petition), or it may be restricted to one or more of the points thus certified, as may be directed by the Judge who grants the application. When a petition to rehear is ordered to be docketed, notice shall at once be given by the clerk to counsel on both sides.

(g) *Stay of Execution.* When a petition to rehear is filed with the clerk of this Court, the Judge designated by the petitioner to pass upon it may, upon application and in his discretion, stay or restrain execution of the judgment or order until the certificate for a rehearing is either refused, or, if allowed, until this Court has finally disposed of the case on the rehearing. Unless the party applying for the rehearing has already stayed execution in the trial tribunal by giving the required security, he shall, at the time of applying to the Judge for a stay, tender sufficient security for that purpose, which shall be approved by the Judge. Notice of the application for a stay must be given to the other party, if deemed proper by the Judge, for such time before the hearing of the application and in such manner as may be ordered. If a petition for a rehearing is denied, or if granted, and the petition is afterwards dismissed, the stay shall no longer continue in force, and execution may issue at once, or the judgment or order be otherwise enforced, unless, in case the petition is dismissed, the Court shall otherwise direct. When a

stay is granted, the order shall run in the name of this Court and be signed and issued by the clerk, under its seal, with proper recitals to show the authority under which it was issued.

Cited in *North Carolina State Bar v. Temple*, 3 N.C. App. 73, 164 S.E.2d 13 (1968).

45. Sittings of the Court.

One panel of the Court will sit daily, during the session as scheduled under Rule 7 (Sundays and Mondays excepted), from 9:30 A. M. to 12:30 P. M., and another panel from 1:00 P. M. to 4:00 P. M., for the hearing of causes, except when the docket of a district is exhausted before the close of the time allotted to it.

46. Citation of Reports.

Supreme Court Rule No. 46 applies with regard to citation of North Carolina Supreme Court decisions. With regard to citation of North Carolina Court of Appeals decisions, the official reports of the North Carolina Court of Appeals shall be cited.

Editor's Note.—The amendment adopted May 19, 1970, added the language which follows "Supreme Court Rule No. 46 applies."

The official volumes of the *North Carolina Reports* should be cited when counsel

seek to rely on North Carolina case law in support of their position. *Resort Dev. Co. v. Phillips*, 3 N.C. App. 295, 164 S.E.2d 516 (1968).

47. Additional Sessions of Court—Reconvening Court.

The Chief Judge shall schedule additional sessions of the Court as required to discharge expeditiously the Court's business.

The Court may be reconvened at any time after final adjournment of any session by order of the Chief Judge, or, in the event of his inability to act, by one of the Associate Judges in order of seniority.

48. Noncompliance with Rules.

If these rules are not complied with, the appeal may be dismissed.

For failure to docket record on appeal within the time prescribed by the rules, the appeal should be dismissed *ex mero motu*. *State v. Byrd*, 4 N.C. App. 494, 167 S.E.2d 95 (1969).

Where defendant fails to docket the record on appeal within the time provided by Rule 5, the appeal is subject to dismissal (1) under Rule 17 if the appellee shall file a proper certificate prior to the docketing of such record on appeal or (2) under this rule by the Court of Appeals on its own motion. *State v. Garnett*, 4 N.C. App. 367, 167 S.E.2d 63 (1969).

Where the record on appeal was docketed in the Court of Appeals after the expiration of the time within which the appeal could be docketed in compliance with Rule 5, and there was no order extending the time for docketing, the Court of Appeals *ex mero motu* will dismiss the appeal for failure to comply with the rules. *Young v.*

State Farm Mut. Auto. Ins. Co., 6 N.C. App. 443, 170 S.E.2d 90 (1969).

Pursuant to this rule, an appeal will be dismissed *ex mero motu* for failure to docket within the time prescribed by Rule 5. *North Carolina State Bar v. Temple*, 6 N.C. App. 437, 170 S.E.2d 131 (1969).

The practice of the Court of Appeals has been to dismiss appeals for failure to docket the record on appeal within the time prescribed by Rule 5. *Young v. State Farm Mut. Auto. Ins. Co.*, 6 N.C. App. 443, 170 S.E.2d 90 (1969).

An appeal is dismissed by the Court of Appeals *ex mero motu* where the record on appeal is docketed more than 90 days after the date of judgment appealed from and the record contains no order extending the time for docketing the record on appeal, an order allowing defendant additional time within which to prepare and serve the case on appeal being insufficient to extend the

time for docketing the record on appeal. *State v. Fulk*, 7 N.C. App. 68, 171 S.E.2d 81 (1969).

A defendant's appeal to the Court of Appeals is subject to dismissal for failure to docket the record on appeal within the time allowed by Rule 5. *State v. Bocage*, 8 N.C. App. 64, 173 S.E.2d 638 (1970).

An appeal is dismissed by the Court of Appeals *ex mero motu* for defendant's failure to docket the record on appeal within the time allowed by Rule 5. *State v. Brigman*, 8 N.C. App. 316, 174 S.E.2d 78 (1970).

Applied in *Bost v. Citizens Nat'l Bank*, 1 N.C. App. 470, 162 S.E.2d 158 (1968); *State v. Wilson*, 3 N.C. App. 225, 164 S.E.2d 546 (1968); *Kelly v. Washington*, 3 N.C. App. 362, 164 S.E.2d 634 (1968); *Robert E. Harris Evangelistic Ass'n v. Board of Tax Supervision*, 3 N.C. App. 479, 165 S.E.2d 67 (1969); *State v. Hogsed*, 3 N.C. App. 481, 165 S.E.2d 18 (1969); *In re Burchette*, 3 N.C. App. 575, 165 S.E.2d 564 (1969); *Richardson v. Shermer*, 3 N.C. App. 588, 165 S.E.2d 342 (1969); *Laws v. Palmer*, 4 N.C. App. 510, 167 S.E.2d 49 (1969); *State v. Ellisor*, 4 N.C. App. 514, 167 S.E.2d 35 (1969); *Umphlett v. Bush*, 7 N.C. App. 72, 171 S.E.2d 80 (1969); *Craven v. Dimmette*, 8 N.C. App. 75, 173 S.E.2d 647 (1970).

Quoted in *Murrell v. Poole*, 1 N.C. App. 584, 162 S.E.2d 121 (1968).

Stated in *State v. Cooper*, 4 N.C. App. 210, 166 S.E.2d 509 (1969); *Coffey v. Vanderbloemen*, 4 N.C. App. 504, 167 S.E.2d 36 (1969); *State v. Black*, 7 N.C. App. 324, 172 S.E.2d 217 (1970); *Epps v. Miller*, 7 N.C. App. 656, 173 S.E.2d 558 (1970).

Cited in *State v. Stewart*, 4 N.C. App. 249, 166 S.E.2d 458 (1969); *Ross v. Sampson*, 4 N.C. App. 270, 166 S.E.2d 499 (1969); *State v. Sherron*, 4 N.C. App. 386, 166 S.E.2d 836 (1969); *State v. Griffin*, 4 N.C. App. 397, 167 S.E.2d 28 (1969); *In re Burrus*, 4 N.C. App. 523, 167 S.E.2d 454 (1969); *State v. Willis*, 4 N.C. App. 641, 167 S.E.2d 518 (1969); *State v. Norman*, 5 N.C. App. 504, 168 S.E.2d 477 (1969).

49. Remedial Writs.

The prerogative writs including mandamus, prohibition, certiorari, and super-sedeas shall be issued and heard by a panel of not less than three Judges of the Court of Appeals.

This rule does not apply to the writ of habeas corpus.
(NOTE: See G.S. 7A-32).

50. Case on Appeal—Extension of Time for Service of.

If it appears that the case on appeal cannot be served within the time provided by statute, rule, or order, the trial judge (or the Chairman of the Industrial Commission or the Chairman of the Utilities Commission as the case may be) may, for good cause and after reasonable notice to the opposing party or counsel, enter an order or successive orders extending the time for service of the case on appeal and counter-case or exceptions to the case on appeal, provided this does not alter the provisions of Rule 5 relating to the docketing of the record on appeal.

Editor's Note. — This rule was added by Supreme Court order adopted Feb. 11, 1969, and was amended by order adopted Feb. 18, 1969.

For note on serving statement of case

on appeal in North Carolina, see 47 N.C.L. Rev. 901 (1969).

Quoted in *Elmore v. Elmore*, 4 N.C. App. 192, 166 S.E.2d 506 (1969).

Fee Bill—Clerk of the Court of Appeals.

Pursuant to G.S. 7A-20 (b), the Court of Appeals of North Carolina hereby adopts the following schedule of fees for services rendered by the clerk of the Court of Appeals:

Docketing an appeal	\$10.00
Docketing petition for certiorari or other petition for extraordinary writ	10.00
Docketing a pauper appeal	2.00
A continuance .....	.50

A scire facias	1.00
A determination	2.00
A certificate	2.00
A fieri facias or other execution	1.00
A subpoena, writ or other process	1.00
A seal .....	.50
An acknowledgment, oath or affidavit .....	.50
Preparing judgment	2.00
Certifying case to Supreme Court of North Carolina	10.00
Furnishing copies of decisions to publishing houses, per page ....	.55
Furnishing copies of decisions to counsel for litigants, per page ..	.40
Docketing and recording disbarment proceedings	1.00
Issuance of execution	2.00
In lieu of fee allowed Attorney General by G.S. 114-8	10.00

(5) GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

Supplemental to the Rules of Civil Procedure

Adopted Pursuant to G.S. 7A-34
Effective July 1, 1970

(Superseding all prior rules of practice in the Superior Court and rules of the conference of Superior Court Judges.)

Rule

1. Philosophy of General Rules of Practice.
2. Calendaring of Civil Cases.
3. Continuances.
4. Enlargement of Time.
5. Form of Pleadings.
6. Motions in Civil Actions.
7. Pre-Trial Procedure.
8. Discovery.
9. Opening Statements.
10. Opening and Concluding Arguments.
11. Examination of Witnesses.

Rule

12. Courtroom Decorum.
13. Presence of Counsel During Jury Deliberation.
14. Custody and Disposition of Evidence at Trial.
15. Photographs and Reproduction of Court Proceedings.
16. Withdrawal of Appearance.
17. Entries on Records.
18. Custody of Appellate Reports.
19. Recordari; Supersedeas; Certiorari.
20. Sureties.

1. Philosophy of General Rules of Practice.

These rules are applicable in the Superior and District Court Divisions of the General Court of Justice. They shall at all times be construed and enforced in such manner as to avoid technical delay and to permit just and prompt consideration and determination of all the business before them.

2. Calendaring of Civil Cases.

Subject to the provisions of Rule 40(a), Rules of Civil Procedure, and G.S. 7A-146:

(a) A ready calendar shall be maintained by the Clerk of the Superior Court. Five months after a complaint is filed the clerk shall place that case on the ready calendar, unless the time is extended by written order by a resident or presiding judge or any district court judge in his respective jurisdiction.

(b) The clerk, who shall act as chairman, plus two or more attorneys selected by members of the local bar, shall be the calendar committee. Acting under the direction of the senior presiding superior court judge (or the Chief District Court Judge in district court matters), the calendar committee shall prepare a tentative trial calendar from the ready calendar. The tentative trial calendar shall be mailed to each attorney of record and to each presiding judge and resident judge four weeks before the first day of court. If, at the tentative calendar meeting of the local bar, the attorneys and clerk cannot agree on the cases to be calendared for trial, the presiding judge, or his designate as calendar judge, shall settle the conflict.

(c) A final trial calendar, prepared by the above committee, shall be mailed to each attorney of record and to each presiding judge no later than two weeks prior to the first day of court.

(d) When an attorney desires a case placed on the ready calendar earlier than five months after complaint is filed, he shall file a certificate of readiness with the clerk, with copy to opposing counsel. The clerk shall immediately place said case

on the ready calendar. (A suggested form for a certificate of readiness is attached.)

(e) Insofar as possible, requests for a peremptory setting should be made to the presiding judge at the first civil session after January 1 and July 1. No case shall be peremptorily set by request unless a certificate of readiness is on file. A peremptory setting shall be had only for good and compelling reasons and shall be ordered by the presiding judge, or Chief District Court Judge. A resident judge, on his own motion, may set a case peremptorily. When two or more civil sessions are being held simultaneously the senior civil presiding judge shall have control over peremptory settings.

(f) On the final trial calendar, cases shall be set in the order in which they were filed.

(g) At the first civil session in January and July the senior presiding judge of the superior court, or the Chief District Judge of the District Court, shall each review all cases on the ready calendar of his court and shall make appropriate disposition and orders in each; to insure full use of court time, he shall confer regularly with the chairman of the calendar committee.

(h) When a case on the published calendar is settled, the clerk must be notified of the settlement within twenty-four hours thereafter. Attorneys for each party shall have the duty to provide such notice. The notice to the clerk shall state who will present the judgment, and when.

3. Continuances.

An application for a continuance shall be made to the presiding judge of the court in which the case is calendared.

When an attorney has conflicting engagements in different courts, priority shall be as follows: Appellate Courts, Federal Court, Superior Court, District Court, Magistrate's Court.

At mixed sessions, criminal cases in which the defendant is in jail shall have absolute priority.

4. Enlargement of Time.

The judge or clerk of the court in which the action is pending may by order extend the time for filing answer.

When counsel, by consent under Rule 6 (b), agree upon an enlargement of time, the agreement shall be reduced to writing and filed with the clerk.

5. Form of Pleadings.

If feasible, each paper presented to the court for filing shall be flat and unfolded, without manuscript cover, and firmly bound.

6. Motions in Civil Actions.

All motions, written or oral, shall state the rule number or numbers under which the movant is proceeding. (See Rule 7 of Rules of Civil Procedure.)

Motions may be heard and determined either at the pre-trial conference or on motion calendar as directed by the presiding judge.

Every motion shall be signed by at least one attorney of record in his individual name. He shall state his office address and telephone number immediately following his signature. The signature of an attorney constitutes a certificate by him that he has read the motion; that to the best of his knowledge, information and belief, there are good grounds to support it; and that the motion is not interposed for delay. (See Rule 7 (b) (2); also Rule 11.)

7. Pre-Trial Procedure. (See Rule 16)

There shall be a pre-trial conference in every civil case, unless counsel for all parties stipulate in writing to the contrary and the court approves the stipulation. Upon its own motion or upon request of any party, the court may dispense with or limit the scope of the pre-trial conference or order.

In uncontested divorce, default, and magistrate cases and magistrate appeals, a pre-trial conference or order is not required.

A party who has not requested a pre-trial conference may not move for a continuance on the ground that it has not been held.

At least twenty-one days prior to trial date, the plaintiff's attorney shall arrange a pre-trial conference with the defendant's attorney to be held not later than seven days before trial date. At such conference a pre-trial order shall be prepared and signed by the attorneys.

If, after due diligence, plaintiff's attorney cannot arrange a conference with defendant's attorney, he may apply to the presiding judge or other judge holding court in the district (or district court judge with respect to district court cases) who shall make an appropriate order. The defense attorney may initiate pre-trial under the same rules applicable to plaintiff's attorney.

The pre-trial order shall be in substance as shown on the attached sample form.

8. Discovery.

All desired discovery shall be completed within 120 days of the date of the last required pleading. For good cause shown, a judge having jurisdiction may enlarge the period of discovery.

Counsel are required to begin promptly such discovery proceedings as should be utilized in each case, and are authorized to begin even before the pleadings are completed. Counsel are not permitted to wait until the pre-trial conference is imminent to initiate discovery.

9. Opening Statements.

At any time before the presentation of evidence counsel for each party may make an opening statement setting forth the grounds for his claim or defense.

The parties may elect to waive opening statements.

Opening statements shall be subject to such time and scope limitations as may be imposed by the court.

10. Opening and Concluding Arguments.

In all cases, civil or criminal, if no evidence is introduced by the defendant, the right to open and close the argument to the jury shall belong to him. If a question arises as to whether the plaintiff or the defendant has the final argument to the jury, the court shall decide who is so entitled, and its decision shall be final.

In a criminal case, where there are multiple defendants, if any defendant introduces evidence the closing argument shall belong to the solicitor.

In a civil case, where there are multiple defendants, if any defendant introduces evidence, the closing argument shall belong to the plaintiff, unless the trial judge shall order otherwise.

11. Examination of Witnesses.

When several counsel are employed by the same party, the examination or cross-examination of each witness for such party shall be conducted by one counsel, but the counsel may change with each successive witness or, with leave of the court, in a prolonged examination of a single witness.

12. Courtroom Decorum.

Except for some unusual reason connected with the business of the court, attorneys will not be sent for when their cases are called in their regular order.

Counsel are at all times to conduct themselves with dignity and propriety. All statements and communications to the court other than objections and exceptions shall be clearly and audibly made from a standing position behind the counsel table. Counsel shall not approach the bench except upon the permission or request of the court.

The examination of witnesses and jurors shall be conducted from a sitting position behind the counsel table except as otherwise permitted by the court [see *S. vs. Bass*, 5 N.C. App. 431 (1969)]. Counsel shall not approach the witness except for the purpose of presenting, inquiring about, or examining the witness with respect to an exhibit, document, or diagram.

Any directions or instructions to the court reporter are to be made in open court by the presiding judge only, and not by an attorney.

Business attire shall be appropriate dress for counsel while in the courtroom.

All personalities between counsel should be avoided. The personal history or peculiarities of counsel on the opposing side should not be alluded to. Colloquies between counsel should be avoided.

Adverse witnesses and suitors should be treated with fairness and due consideration. Abusive language or offensive personal references are prohibited.

The conduct of the lawyers before the court and with other lawyers should be characterized by candor and fairness. Counsel shall not knowingly misinterpret the contents of a paper, the testimony of a witness, the language or argument of opposite counsel or the language of a decision or other authority; nor shall he offer evidence which he knows to be inadmissible. In an argument addressed to the court, remarks or statements should not be interjected to influence the jury or spectators. (See Rule 22, Canons of Ethics and Rules of Professional Conduct, N.C. State Bar, G.S. 4A p. 273.)

Suggestions of counsel looking to the comfort or convenience of jurors should be made to the court out of the jury's hearing. Before, and during trial, a lawyer should attempt to avoid communicating with jurors, even as to matters foreign to the cause.

Counsel should yield gracefully to rulings of the court and avoid detrimental remarks both in court and out. He should at all times promote respect for the court. (See Rule 1, Canons of Ethics and Rules of Professional Conduct, N.C. State Bar, G.S. 4A p. 269.)

13. Presence of Counsel During Jury Deliberation.

The right to be present during the trial of civil cases shall be deemed to be waived by a party or his counsel by voluntary absence from the courtroom at a time when it is known that proceedings are being conducted, or are about to be conducted. In such event the proceedings, including the giving of additional instructions to the jury after they have once retired, or receiving the verdict, may go forward without waiting for the arrival or return of counsel or a party.

After the jury has retired to deliberate upon a verdict in a criminal case, at least one attorney representing the defendant shall remain in the immediate area of the courtroom so as to be available at all times during the deliberation of the jury and when the verdict is received.

14. Custody and Disposition of Evidence at Trial.

Once any item of evidence has been introduced, the clerk (not the court reporter) is the official custodian thereof and is responsible for its safekeeping and availability for use as needed at all adjourned sessions of the court and for appeal.

After being marked for identification, all exhibits offered or admitted in evidence in any cause shall be placed in the custody of the clerk, unless otherwise ordered by the court.

Whenever any models, diagrams, exhibits, or materials have been offered into evidence and received by the clerk, they shall be removed by the party offering them, except as otherwise directed by the court, within 30 days after final judgment in the trial court if no appeal is taken; if the case is appealed, within 60 days after certification of a final decision from the appellate division. At the time of removal a detailed receipt shall be given to the clerk and filed in the case file.

If the party offering an exhibit which has been placed in the custody of the clerk fails to remove such article as provided herein, the clerk shall write the attorney of record (or the party offering the evidence if he has no counsel) calling attention to the provisions of this rule. If the articles are not removed within 30 days after the mailing of such notice, they may be disposed of by the clerk.

15. Photographs and Reproduction of Court Proceedings.

The taking of photographs in the courtroom, or in the corridors immediately adjacent thereto, during the progress of judicial proceedings, or during any recess thereof, is prohibited. The transmission or recording of such proceedings for broadcast by radio or television is likewise prohibited.

Nonjudicial ceremonies such as administering oaths of office, presentation of portraits, and similar ceremonial occasions, may be photographed in or broadcast from the courtroom under the supervision of the court.

16. Withdrawal of Appearance.

No attorney who has entered an appearance in any civil action shall withdraw his appearance, or have it stricken from the record, except on order of the court. Once a client has employed an attorney who has entered a formal appearance, the attorney may not withdraw or abandon the case without (1) justifiable cause, (2) reasonable notice to the client, and (3) the permission of the court. (See *Smith vs. Bryant*, 264 N.C. 208. See also Rule 43 of Rules of the N.C. State Bar, Volume 4(a) of General Statutes of North Carolina, page 278, entitled "Withdrawal from employment as attorney or counsel.")

17. Entries on Records.

No entry shall be made on the records of the Superior or District Court by any person except the clerk, his regular deputy, a person specifically directed by the presiding judge, or the judge himself.

18. Custody of Appellate Reports.

The clerks of the Superior Court shall be officially responsible for the care and preservation of the volumes of the Appellate Division Reports furnished by the State pursuant to G.S. 147-45, and for the General Statutes of North Carolina furnished by the Administrative Office of the Courts under G.S. 7A-300(9).

Each clerk of the Superior Court shall report to the presiding judge of the Superior Court at the first session of court held in January and July each year what volumes, if any, of said reports are missing or have been lost since the last report to the end that the judge may enter an appropriate order for replacement of same pursuant to G.S. 147-51.

19. Recordari; Supersedeas; Certiorari.

The Superior Court shall grant the writ of recordari only upon petition specifying the grounds of the application. The petition shall be verified and the writ may

be granted with or without notice. When notice is given the petition shall be heard upon answer thereto duly verified, and upon the affidavits and other evidence offered by the parties. The decision thereupon shall be final, subject to appeal as in other cases. If the petition is granted without notice, the petitioner shall give an undertaking for costs and for the writ of supersedeas, if prayed for. In such case the writ of recordari shall be made returnable to the session of the Superior Court of the county in which the judgment or proceeding complained of was granted, and ten days' written notice shall be given to the adverse party before the session of the court to which the writ is returnable. At that session the respondent may move to dismiss, or may answer the writ, and the answer shall be verified. After hearing the application upon the petition, answer, affidavits, and evidence offered, the court shall dismiss it or order it placed on the trial docket.

In proper cases and in like manner, the court may grant the writ of certiorari. When a diminution of the record is suggested and the record is manifestly imperfect, the court may grant the writ upon motion in the cause.

20. Sureties.

No member of the bar, in any case, suit, action or proceeding in which he appears as counsel, and no employee of the General Court of Justice, employee of the Sheriff's Department, or other law enforcement officer, shall act as a surety in any suit, action or proceeding pending in any division of the General Court of Justice.

NORTH CAROLINA
..... COUNTY

IN THE GENERAL COURT OF JUSTICE
..... COURT DIVISION

PLAINTIFF
-v-
DEFENDANT

FILE #:
FILM #:

CERTIFICATE OF READINESS

As counsel of record for (name the party you represent) who is a plaintiff, defendant, third party, (underline one) I hereby certify that:

- A. I know of no procedural matters which would delay the trial of the case when called for jury trial;
- B. All motions existing of record this date have been heard or otherwise disposed of;
- C. I know of no parties or witnesses desired that will not be available on the trial date;
- D. I know of no current reason that would cause me to move for a continuance;
- E. I am ready for trial.

This the day of

.....
Attorney

IN THE GENERAL COURT OF JUSTICE

..... COURT DIVISION

Plaintiff(s) }
-v-
Defendant(s) }

FILE #:
FILM #:

ORDER ON FINAL PRE-TRIAL CONFERENCE

Pursuant to the provisions of Rule 16 of the State Rules of Civil Procedure, and Rule 7, General Rules of Practice, a final pre-trial conference was held in the above-entitled cause on the day of 19....., Esquire, appeared as counsel for the plaintiff(s) ; Esquire, appeared as counsel for the defendant(s).

(1) It is stipulated that all parties are properly before the court, and that the court has jurisdiction of the parties and of the subject matter.

Note: If the facts are otherwise, they should be accurately stated.

(2) It is stipulated that all parties have been correctly designated, and there is no question as to misjoinder or nonjoinder of parties.

Note: If the facts are otherwise, they should be accurately stated.

(3) If any of the parties is appearing in a representative capacity, it should be set out whether there is any question concerning the validity of the appointment of the representatives. Letters or orders of appointment should be included as exhibits.

(4) Any third-party defendant(s) or cross-claimant(s) should follow the same procedure as set out in paragraphs (4) and (5) for plaintiff(s) and defendant(s).

(5) In addition to the other stipulations contained herein, the parties hereto stipulate and agree with respect to the following undisputed facts:

(a)

(b)

Note: Here set out all facts not in genuine dispute.*

(6) The following is a list of all known exhibits the plaintiff(s) may offer at the trial:

(a)

(b)

Note: Here list the pre-trial identification numbers and a brief description of each exhibit.

(7) It is stipulated and agreed that opposing counsel has been furnished a copy of each exhibit identified by the plaintiff(s), except:

Note: Here set out stipulations with respect to (a) the exhibits that have been furnished opposing counsel, (b) the arrangements made for the inspection of exhibits of the character which prohibits or makes impractical their reproduction, and (c) any waiver of the requirement to furnish opposing counsel with a copy of exhibits.

Note: Here set out with particularity the basis of objection to specific exhibits.

It is permissible to generally reserve the right to object at the trial on grounds of relevancy and materiality.

* IN CONTRACT CASES, the parties may stipulate upon, or state their contentions with respect to, where applicable (a) whether the contract relied on was oral or in writing; (b) the date thereof and the parties thereto; (c) the substance of the contract, if oral; (d) the terms of the contract which are relied upon and the portions in controversy; (e) any collateral oral agreement, if claimed, and the terms thereof; (f) any specific breach of contract claimed; (g) any misrepresentation of fact claimed; (h) if modification of the contract or waiver of covenant is claimed, what modification or waiver, and how accomplished, and (i) an itemized statement of damages claimed to have resulted from any alleged breach, the source of such information, how computed, and any books or records available to sustain such damage claimed.

IN MOTOR VEHICLE NEGLIGENCE CASES, the parties may stipulate upon, or state their contentions with respect to, where applicable (a) the owner, type and make of each vehicle involved; (b) the agency of each driver; (c) the place and time of accident, conditions of weather, and whether daylight or dark; (d) nature of terrain as to level, uphill or downhill; (e) traffic signs, signals and controls, if any, and by what authority placed; (f) any claimed obstruction of view; (g) presence of other vehicles, where significant; (h) a detailed list of acts of negligence or contributory negligence claimed; (i) specific statutes, ordinances, rules, or regulations alleged to have been violated, and upon which each of the parties will rely at the trial to establish negligence or contributory negligence; (j) a detailed list of nonpermanent personal injuries claimed, including the nature and extent thereof; (k) a detailed list of permanent personal injuries claimed, including nature and extent thereof; (l) the age of any party alleged to have been injured; (m) the life and work expectancy of any party seeking to recover for permanent injury; (n) an itemized statement of all special damages, such as medical, hospital, nursing, etc., with the amount and to whom paid; (o) if loss of earnings is claimed; (p) a detailed list of any property damages, and (q) in death cases, the decedent's date of birth, marital status, employment for five years before date of death, work expectancy, reasonable probability of promotion, rate of earnings for five years before date of death, life expectancy under mortuary table, and general physical condition immediately prior to date of death.

IN THE EVENT THIS CASE DOES NOT FALL WITHIN ANY OF THE CATEGORIES ENUMERATED ABOVE, OR ANY OF THE CATEGORIES SUGGESTED BY THIS FORM, COUNSEL SHOULD, NEVERTHELESS, SET FORTH THEIR POSITIONS WITH AS MUCH DETAIL AS POSSIBLE.

(8) It is stipulated and agreed that each of the exhibits identified by the plaintiff(s) is genuine and, if relevant and material, may be received in evidence without further identification or proof, except:

(9) The following is a list of all known exhibits the defendant(s) may offer at the trial:

(a)

(b)

Note: Here list the pre-trial identification and a brief description of each exhibit.

(10) It is stipulated and agreed that opposing counsel has been furnished a copy of each exhibit identified by the defendant(s), except:

Note: Here set out stipulations with respect to (a) the exhibits that have been furnished opposing counsel, (b) the arrangements made for the inspection of exhibits of the character which prohibits or makes impractical their reproduction, and (c) any waiver of the requirement to furnish opposing counsel with a copy of exhibits.

(11) It is stipulated and agreed that each of the exhibits identified by the defendant(s) is genuine, and, if relevant and material, may be received in evidence without further identification or proof, except:

Note: Here set out with particularity the basis of objection to specific exhibits. It is permissible to generally reserve the right to object at the trial on grounds of relevancy and materiality.

(12) Any third-party defendant(s) and cross-claimant(s) should follow the same procedure with respect to exhibits as required of plaintiff(s) and defendant(s).

Note: Attention is called to the provisions of the pre-trial rule with respect to the obligation to immediately notify opposing counsel if additional exhibits are discovered after the preparation of this order.

(13) The following is a list of the names and addresses of all known witnesses the plaintiff(s) may offer at the trial:

Note: If either plaintiff or defendant's attorney discover additional witnesses after this listing, attention is called to obligation to notify opposing counsel. There shall be no requirement that all witnesses listed by a party be used, and the court may after satisfactory explanation, in his discretion, permit the use of a witness not listed.

The trial judge may, for good cause made known to him, relieve a party of the requirement of disclosing the name of any witness.

(14) The following is a list of the names and addresses of all known witnesses the defendant(s) may offer at the trial:

(15) Any third-party defendant(s) and cross-claimant(s) should follow the same procedure with respect to witnesses as above outlined for plaintiff(s) and defendant(s). Counsel shall immediately notify opposing counsel if the names of additional witnesses are discovered after the preparation of this order.

(16) There are no pending motions, and neither party desires further amendments to the pleadings, except:

Note: Here state facts regarding pending or impending motion. If any motions are contemplated, such as motion for the physical examination of a party, motion to take the deposition of a witness for use as evidence, etc., such motions should be filed in advance of the final pre-trial conference so that they may be ruled upon, and the rulings stated in the final pre-trial order. The same procedure should be followed with respect to any desired amendments to pleadings.

(17) Additional consideration has been given to a separation of the triable issues, and counsel for all parties are of the opinion that a separation of issues in this particular case would (would not) be feasible.

(18) The plaintiff(s) contends (contend) that the contested issues to be tried by the court (jury) are as follows:

(19) The defendant(s) contends (contend) that the contested issues to be tried by the court (jury) are as follows :

(20) Any third-party defendant(s) and cross-claimant(s) contends (contend) that the contested issues to be tried by the court (jury) are as follows :

Note: In all instances possible, the parties should agree upon the triable issues and include them in this order in the form of a stipulation, in lieu of the three preceding paragraphs.

(21) Counsel for the parties announced that all witnesses are available and the case is in all respects ready for trial. The probable length of the trial is estimated to be days.

(22) Counsel for the parties represent to the court that, in advance of the preparation of this order, there was a full and frank discussion of settlement possibilities. Counsel for the plaintiff will immediately notify the clerk in the event of material change in settlement prospects.

Note: Counsel shall be required to conduct a frank discussion concerning settlement possibilities at the time of the conference of attorneys, and clients shall either be consulted in advance of the conference concerning settlement figures or be available for consultation at the time of the conference. The court will make inquiry at the time of trial as to whether this requirement was strictly observed.

.....
Counsel for Plaintiff(s)
.....
Counsel for Defendant(s)
.....
Approved and Ordered Filed.
.....
Judge Presiding

Date:

Appendix II. Rules of Practice in United States District Courts

The United States District Court for the Middle District of North Carolina

RULES OF PRACTICE AND PROCEDURE

Effective January 1, 1970

COUNTIES IN THE DISTRICT

Alamance	Davidson	Lee	Richmond	Surry
Alleghany	Davie	Montgomery	Rockingham	Watauga
Ashe	Durham	Moore	Rowan	Wilkes
Cabarrus	Forsyth	Orange	Scotland	Yadkin
Caswell	Guilford	Person	Stanly	
Chatham	Hoke	Randolph	Stokes	

UNITED STATES DISTRICT JUDGES

EDWIN M. STANLEY, *Chief Judge*, Greensboro, North Carolina
EUGENE A. GORDON, *Judge*, Winston-Salem, North Carolina
JOHNSON J. HAYES, *Senior Judge*, Wilkesboro, North Carolina

CLERK

HERMAN AMASA SMITH Federal Building, W. Market Street
U.S. Post Office and Courthouse
Post Office Box V-1
Greensboro, North Carolina
27402
Telephone: 275-9111 Ext. 349

REFEREE IN BANKRUPTCY

RUFUS W. REYNOLDS 902 Southeastern Building
Greensboro, North Carolina
27401
Telephone: 273-1987

PROBATION OFFICER

O. LEON GARBER, *Chief Probation Officer* Federal Building, W. Market Street
U.S. Post Office and Courthouse
Post Office Box 629
Greensboro, North Carolina
27402
Telephone: 275-9111 Ext. 341

**The United States District Court for the Middle
District of North Carolina**

IN THE MATTER OF
RULES OF PRACTICE AND PROCEDURE } ORDER
IN THIS COURT

Pursuant to the authority of Rule 83, Federal Rules of Civil Procedure, Rule 57, Federal Rules of Criminal Procedure, Section 2a (15) of the Bankruptcy Act and General Order In Bankruptcy Number 56, for good cause appearing therefor,

IT IS ORDERED THAT:

(a) The following General Rules, Criminal Rules, Civil Rules, and Rules in Bankruptcy are hereby approved and adopted to govern applicable practice and procedure in this court.

(b) These rules shall supersede all rules or orders heretofore adopted pertaining to practice and procedure before this court.

(c) The effective date of these rules shall be December 2, 1963, and they shall apply to all pending litigation. The rules of practice and procedure presently in effect shall continue to govern all litigation in this court until the effective date of these rules.

(d) When, by legislative enactment or judicial rule or order, it is apparent that a conflict exists, these rules shall be considered automatically changed as to conform to such higher authorities.

(e) The clerk shall arrange for the printing and distribution of these rules, and any amendments made subsequent to their adoption. Since the rules are being published by The Michie Company as a part of the General Statutes of North Carolina, this will serve as distribution to the members of the bar of this court and to each of the law schools in the State of North Carolina. The clerk will arrange for distribution of other copies required by the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure.

(f) These rules shall be cited as Local Rule

EDWIN M. STANLEY
*United States District Judge
Middle District of North Carolina*

EUGENE A. GORDON
*United States District Judge
Middle District of North Carolina*

Acknowledgments

The Court hereby acknowledges deep appreciation to Welch O. Jordan, Chairman, Thornton H. Brooks, Beverly C. Moore and Richard L. Wharton, of the Greensboro Bar, James L. Newsom and Jerry L. Jarvis, of the Durham Bar, William D. Sabiston, Jr., of the Moore County Bar, Robin L. Hinson, of the Richmond County Bar, Ralph M. Stockton, Jr., and Leon L. Rice, Jr., of the Winston-Salem Bar, Kyle Hayes and William H. McElwee, of the North Wilkesboro Bar, Don A. Walser, of the Lexington Bar, and Nelson Woodson of the Rowan County Bar, all practicing attorneys, members of the bar of this court, and heretofore appointed to the Advisory Committee on Local Rules of Practice and Procedure of this court, for the extended and helpful services rendered in compiling these rules. The Court also acknowledges appreciation to Rufus W. Reynolds, Referee in Bankruptcy, and William L. Osteen, United States Attorney, both of whom acted in an advisory capacity to the Committee, and to Herman Amasa Smith, Clerk, for his helpful cooperation in acting as secretary.

Additionally, the Court acknowledges sincere appreciation to The Michie Company, Charlottesville, Virginia, for its cooperation in publishing these rules, without charge to the Government, as a part of the General Statutes of North Carolina.

EDWIN M. STANLEY
United States District Judge

EUGENE A. GORDON
United States District Judge

United States District Court for the Middle District of North Carolina

Table of Rules

[*Cite these Rules as: Local Rule*]

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(6) Same: After Trial	(3) Court of Appeals
(7) Same: More Restrictive Rules	(4) U. S. Supreme Court
(h) Courtroom Decorum	(5) U. S. Supreme Court, cert. denied.
(1) Attitude Toward Court	7. Jurors
(2) Examination of Witness	(a) Court Techniques to Insure a Fair Trial
(i) Agreement Between Attorneys and Parties	(b) Examination of Jurors
3. Court Schedule and Conduct of Business	(c) Same: Scope of Examination
(a) Headquarters of Court; Filing of Papers	(1) Civil
(b) Divisions of Court; Regular Sessions of Court	(2) Criminal
(c) Court in Continuous Session	(d) Same: Questions Requested by Counsel
(d) Place and Hour of Holding Court	(e) Jury Lists
(e) Order of Business, Regular Sessions of Court	(1) Availability Before Session of Court
	(2) Availability at Session of Court
	(f) Instructions to Jury
	8. Jury Arguments; Right to Open and Close
	9. Transcript of Proceedings; Court Reporter's Fees
	10. Designation of Contents of Record on Appeal
	11. Trial Publicity
	(a) Photographing and Reproduction of Court Proceedings

APPENDIX II—U.S. DISTRICT COURT RULES

Rule

11. Trial Publicity—Continued
 - (b) Special Orders, Widely Publicized and Sensational Cases
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 - (2) Extension of Time to Plead, Answer Interrogatories and Requests for Admission
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 - (5) Default Judgments
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15. Custody and Disposition of Models and Exhibits
 - (a) Custody
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17. Form of Pleadings and Documents
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 - (3) Notice
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 - (1) Time for Filing Documents
 - (2) Time for Filing Briefs
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 - (a) Requirement for Pre-Trial
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 - (1) Contentions of Plaintiff
 - (2) Contentions of Defendant
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 - (4) Suggested Stipulations
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Rule

22. Pre-Trial and Discovery in Civil Cases —Continued

- (j) Conference of Attorneys; Time; Preparation for—Continued
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- (7) Triable Issues
- (k) Discussion of Settlement Possibilities
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- (a) Appearances
 - (1) Minor or Incompetent Plaintiffs
 - (2) Minor or Incompetent Defendants
- (b) Appointment of Next Friend or Guardian *Ad Litem*
 - (1) Minor or Incompetent Plaintiff
 - (2) Minor or Incompetent Defendant
- (c) Supervision and Removal of Next Friend or Guardian *Ad Litem*
- (d) Dismissal of Actions; Court to Approve
- (e) Settlement of Claims of Minors or Incompetents
- (f) Same: Hearings
 - (1) Motion
 - (2) Contents of Documents to Be Presented
 - (i) Nature of the Action and Contentions of the Parties
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Rule

24. Minors and Incompetents as Parties —Continued

- (f) Same: Hearings—Continued
 - (2) Contents of Documents to Be Presented — Continued
 - (iv) Medical and Hospital Expenses
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 - (g) Judgments Approving Settlement
 - (1) To Be Consented to
 - (2) Contents
 - (h) Payment of Medical Expenses from Proceeds of Judgment
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 - (1) Medical Expenses
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- #### 25. Opening Statements in Civil Actions
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- (a) Bond Premiums
 - (b) Witness Fees, Subsistence and Mileage
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 - (1) Hearing by Clerk
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- 28. Pre-Trial of Criminal Cases
- 29. Motions in Criminal Cases
- 30. Arraignment
- 31. Opening Statements in Criminal Actions
- 32. Pleas in Mitigation of Punishment
- 33. Motions for Reduction or Correction of Sentence
- 34. Post-Conviction Motions
- 35. Representation of Indigent Defendants

IV. Bankruptcy Rules

- 36. Filing Fees
 - (a) Original Petition
 - (1) Ordinary Bankruptcy
 - (2) Chapter XI, Arrangement
 - (3) Chapter XII, Real Property Arrangement
 - (4) Chapter X, Corporate Reorganization
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 - (6) Chapter IX, Composition of Local Taxing Agency
 - (7) Chapter XIII, Wage Earners
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Rule

- 36. Filing Fees—Continued
 - (d) Petitions in Pending Cases
 - (1) To Reclaim Property
 - (2) To Review Order of Referee
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 - (e) Changes
- 37. Filing Original Petitions, Schedules and Statement of Affairs
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 - (b) Full Name and Trade Names
 - (c) Listing Creditors
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 - (f) Personal Property Exemptions
 - (g) Estates by the Entirety
- 38. Appearance of Attorneys
 - (a) Qualified Attorneys Defined
 - (b) Disposition of Claims Filed by Disqualified Persons
- 39. Employment of Attorneys
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 - (a) Petition for Fee
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 - (c) Fixing Fees; Matters Considered
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- 41. Reference of Petitions
- 42. Petitions, Orders and Pleadings After Reference
 - (a) To Be Filed with Referee
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 - (1) Documents Needing Verification
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- 42. Petitions, Orders and Pleadings After Reference—Continued
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- 44. Objections to Discharge
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- 46. Filing Claims
 - (a) Form; Contents
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- 47. Solicitation of Proxies and Voting
 - (a) Requirements for Voting by Attorneys at Law
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Form

- 1. Final Pre-Trial Conference Order and Check List.

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- 2. Official Caption and Verification.
- 3. Division of Attorneys' Fees, Affidavit.
- 4. Specifications of Objections to Discharge.

I. General Rules

[Cite these Rules as: Local Rule]

Rule 1.

PHILOSOPHY OF RULES

Consistent with the provisions of the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure and the Bankruptcy Act, these rules shall at all times be construed and enforced in such manner as to avoid technical delay, permit just and prompt consideration and determination of all proceedings, and promote efficient administration.

Rule 2.

ATTORNEYS

(a) **Roll of Attorneys.** The bar of this court shall consist of those attorneys admitted to practice before this court.

(b) Eligibility and Admission.

(1) Any person who has been admitted to practice and is in good standing before the Supreme Court of North Carolina, and who is a resident of the State of North Carolina, is eligible for admission to the bar of this court.

(2) Eligible attorneys shall be admitted to practice in this court upon oral motion made in open court by a member of the bar of this court. If the motion for admission is granted, the applicant shall take the following oath or affirmation:

I do solemnly swear [affirm] that I have been admitted to practice before the Supreme Court of North Carolina, and that I am a member in good standing of that court; that I am a resident of the State of North Carolina; that to the best of my knowledge and ability, I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will demean myself as an attorney of this court uprightly and according to law, SO HELP ME, GOD. [SUCH BE MY SOLEMN AFFIRMATION.]

(c) Fee. The fee for admission to the bar of this court shall be \$2.00, payable to the clerk at the time of admission.

(d) Litigants Must Be Represented by Member of the Bar of This Court; Special Admissions.

(1) Every litigant in civil and criminal actions, except governmental agencies and parties appearing *pro se*, must be represented by at least one member of the bar of this court, who shall state his name, office address and telephone number on each pleading. The service of all pleadings and notices permitted by the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure shall be sufficient if served upon such attorney.

(2) Any person who is a member in good standing of the bar of the Supreme Court of the United States, or the bar of the highest court of any state in the United States, or the District of Columbia, shall be permitted to appear in a particular case in association with a member of the bar of this court.

(3) All pleadings presented to the clerk for filing, except by attorneys representing governmental agencies or parties appearing *pro se*, shall be rejected unless signed by at least one attorney who is a member of the bar of this court.

(e) Withdrawal of Appearance. No attorney who has entered an appearance in any civil or criminal action shall withdraw his appearance, or have it stricken from the record, except on order of the court.

(f) Disbarment and Discipline.

(1) Upon notice and hearing, any member of the bar of this court may, for good cause shown, be disbarred, suspended from practice for a definite time, reprimanded, or subjected to such other discipline as the court may deem proper. Whenever any member of the bar of this court has been disbarred from practice by either the appellate or trial division of the General Court of Justice, the North Carolina State Bar, or as otherwise provided by North Carolina General Statutes § 84-28, and such disbarment has become final, such member shall be disbarred forthwith from practice in this court, without notice or a hearing, upon the filing in this court of a certified copy of the final order of disbarment.

(2) Any attorney who before his admission to the bar of this court, or during his disbarment or suspension, exercises any of the privileges of the members of the bar of this court, or pretends to be entitled to do so, shall be guilty of contempt of court and subject to appropriate punishment therefor.

(g) Public Discussion of Litigation by Attorneys.

(1) *Release of Information by Attorneys.* It is the duty of the lawyer not to release or authorize the release of information or opinion for dissemination by any means of public communication, in connection with pending or imminent criminal litigation with which he is associated, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.

(2) *Same: Pending Investigation.* With respect to a grand jury or other pending investigation of any criminal matter, a lawyer participating in the investigation shall refrain from making any extrajudicial statement, for dissemination by any means of public communication, that goes beyond the public record or that is not necessary to inform the public that the investigation is underway, to describe the general scope of the investigation, to obtain assistance in the apprehension of a suspect, to warn the public of any dangers, or otherwise to aid in the investigation.

(3) *Same: From Arrest.* From the time of arrest, issuance of an arrest warrant or the filing of a complaint, information, or indictment in any criminal matter until the commencement of trial or disposition without trial, a lawyer associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement, for dissemination by any means of public communication, relating to that matter and concerning:

(i) The prior criminal record (including arrests, indictments, or other charges of crime), or the character or reputation of the accused, except that the lawyer may make a factual statement of the accused's name, age, residence, occupation, and family status, and if the accused has not been apprehended, a lawyer associated with the prosecution may release any information necessary to aid in his apprehension or to warn the public of any dangers he may present;

(ii) The existence or contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make any statement;

(iii) The performance of any examinations or tests or the accused's refusal or failure to submit to an examination or test;

(iv) The identity, testimony, or credibility of prospective witnesses, except that the lawyer may announce the identity of the victim if the announcement is not otherwise prohibited by law;

(v) The possibility of a plea of guilty to the offense charged or a lesser offense;

(vi) Any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case.

(4) *Same: Matters of Record.* The foregoing shall not be construed to preclude the lawyer during this period in the proper discharge of his official or professional obligations, from announcing the fact and circumstances of arrest (including time and place of arrest, resistance, pursuit, and use of weapons), the identity of the investigating and arresting officer or agency, and the length of the investigation; from making an announcement, at the time of seizure of any physical evidence other than a confession, admission or statement, which is limited to a description of the evidence seized; from disclosing the nature, substance, or text of the charge, including a brief description of the offense charged; from quoting or referring without comment to public records of the court in the case; from announcing the scheduling or result of any stage in the judicial process; from requesting assistance in obtaining evidence; or from announcing without further comment that the accused denies the charges made against him.

(5) *Same: During Trial.* During the trial of any criminal matter, including the period of selection of the jury, no lawyer associated with the prosecution or defense shall give or authorize any extrajudicial statement or interview, relating to the trial or the parties or issues in the trial, for dissemination by any means of

public communication, except that the lawyer may quote from or refer without comment to public records of the court in the case.

(6) *Same: After Trial.* After the completion of a trial or disposition without trial of any criminal matter, and prior to the imposition of sentence, a lawyer associated with the prosecution or defense shall refrain from making or authorizing any extrajudicial statement, for dissemination by any means of public communication, if there is a reasonable likelihood that such dissemination will affect the imposition of sentence.

(7) *Same: More Restrictive Rules.* Nothing in this rule is intended to preclude the formulation or application of more restrictive rules relating to the release of information about juvenile or other offenders, to preclude the holding of hearings or the lawful issuance of reports by legislative, administrative, or investigative bodies, or to preclude any lawyer from replying to charges of misconduct that are publicly made against him.

(h) Courtroom Decorum.

(1) Counsel shall at all times conduct and demean themselves with dignity and propriety. All statements and communications to the court shall be clearly and audibly made from a standing position behind a counsel table or lectern. Counsel shall not approach the bench, except upon the permission or request of the court.

(2) The examination of witnesses shall be conducted from behind counsel table or lectern. Counsel shall not approach the witness except for the purpose of presenting, inquiring about, or examining the witness with respect to an exhibit. Only one attorney for each party may participate in the examination or cross-examination of a witness.

(i) **Agreement Between Attorneys and Parties.** All agreements between attorneys, or parties appearing *pro se*, must be reduced to writing and signed. Otherwise, they will not be considered by the court.

Rule 3.

COURT SCHEDULE AND CONDUCT OF BUSINESS

(a) **Headquarters of the Court.** The headquarters of the court shall be located in Greensboro, and all pleadings and papers submitted to the clerk for filing in any division shall be filed in Greensboro.

(b) **Divisions of the Court; Counties Comprising the Divisions; Regular Sessions of Court.** There shall be six divisions of the court. The headquarters of the counties comprising, and the regular sessions of court for each of the divisions, are as follows:

<i>Division and Court Headquarters</i>	<i>Countries Comprising Division</i>	<i>Regular Court Sessions</i>
Rockingham	Hoke Montgomery Moore Richmond Scotland	Second Monday in March and September
Durham	Person Lee Orange Chatham Durham	Fourth Monday in March and September
Wilkesboro	Alleghany Ashe Watauga Wilkes	Third Monday in April and October
Winston-Salem	Forsyth Stokes Surry Yadkin	First Monday in May and November
Salisbury	Cabarrus Davidson Davie Rowan Stanly	Third Monday in May and November
Greensboro	Alamance Caswell Guilford Randolph Rockingham	First Monday in June and December

(c) **Court in Continuous Session.** The court shall be in continuous session in all divisions of the district, and all matters, criminal and civil, not reached at regular sessions of court are deemed to be in an open status and subject to call at any time before the next regular session of court upon reasonable notice to the interested parties.

(d) **Place of Holding Court.** Regular sessions of court, motion days, pre-trial conferences, and other court business, will be conducted in the courtroom located in the United States Post Office Building in division headquarters, unless otherwise directed. On opening day of regular sessions, court shall commence at 10:00 a.m. On all other days, court shall commence at 9:30 a.m., unless otherwise announced.

(e) **Business at Regular Sessions of Court.** Criminal actions will first be disposed of at regular sessions of court. In divisions other than Greensboro, civil actions will normally be tried immediately following the trial of criminal actions. Civil sessions will be scheduled in Greensboro as required to dispose of pending litigation.

(f) **Motion Days.**

(1) Motion days will be scheduled in all divisions of the court as required to dispatch promptly and efficiently the business of the court. Notices of motion settings will be given as provided by Local Rule 21 (e) (2) and (3).

(2) Criminal matters of an urgent nature, motions, admission of attorneys, the initial and final pre-trial of civil cases, and other appropriate matters, will be considered on motion days.

(g) **Preparation of Trial Calendars.** All pending criminal cases are calendared for trial at each regular criminal session of court as a matter of course. Trial calendars in civil cases will be prepared by the court, normally at the time of the final pre-trial conference.

(h) **Release of Information by Courthouse Personnel.** All courthouse personnel, including, among others, the United States marshal and his deputies, the Clerk of Court and his deputies, bailiffs, and court reporters, are prohibited from disclosing to any person, without authorization by the court, information relating to a pending criminal case that is not part of the public records of the court. This proscription applies to the divulgence of information concerning arguments and hearings held in chambers or otherwise outside the presence of the public.

Rule 4.

NATURALIZATION

Petitions for naturalization will be regularly considered and acted upon, and appropriate ceremonies conducted in connection therewith, at Greensboro, on Friday after the first Monday in June and December of each year. A committee composed of three prominent residents of this district will be appointed from time to time to arrange for and conduct ceremonies in connection with all regularly held naturalization proceedings. The court may, in its discretion, at other times, consider and act upon petitions for naturalization by members of the armed services, and seamen on merchant vessels registered under the laws of the United States, and members of the immediate families and dependents of such personnel, and in other exceptional cases.

Rule 5.

SURETIES

(a) **Security.** In both civil and criminal actions, except as otherwise provided by law, every bond, undertaking or stipulation must be secured by (1) the deposit of cash or negotiable government bonds, undertaking or stipulation, (2) the undertaking or guaranty of a corporate surety holding a certificate of authority from the Secretary of the Treasury, or (3) the undertaking or guaranty of sufficient solvent sureties, residents of North Carolina, who own real or personal property within the State of North Carolina worth double the amount of the bond, undertaking or stipulation over all debts and liabilities, and over all obligations assumed on other bonds, undertakings, or stipulations, and exclusive of all legal exemptions. A husband and wife may act as surety on a bond, but they shall be considered as only one surety. If a bond, undertaking or stipulation is executed by individual sureties, each surety shall execute his affidavit of justification, giving his full name, occupation, residence and business address, showing that he is qualified as an individual surety under the provisions of this rule.

(b) **Prohibited Sureties.** Members of the bar, administrative officers or employees of this court, the United States marshal, his deputies or assistants, shall not act as a surety in any suit, action or proceeding pending in this court.

Rule 6.

BRIEFS

(a) **Service.** Every brief required by these rules or an order of the court shall be served upon opposing parties or their counsel before it is presented to the clerk, and the brief shall clearly indicate the time and method of service. Briefs shall not become a part of the record in the case.

(b) **Contents.** All briefs filed with the court shall contain:

- (1) A statement of the nature of the matter before the court.
- (2) A concise statement of the facts. Each statement of fact should be supported by reference to a part of the official record in the case.
- (3) A statement of the question or questions involved.
- (4) The argument, which shall refer to all statutes, rules and authorities relied upon. When a case is cited as authority for a position, a brief statement of the facts in that case should be included so that it will be readily apparent to the court that the case is authority for such position.

(c) Citation of Cases. Cases cited should include parallel citations, the year of the decision, and the court deciding the case. The following are illustrations of this rule:

- (1) State Court citation: *Rawls v. Smith*, 238 N. C. 162, 77 S. E. 2d 701 (1953).
- (2) District Court citation: *Smith v. Jones*, 141 F. Supp. 248 (E. D. S. C. 1956).
- (3) Court of Appeals citation: *Smith v. Jones*, 4 Cir., 237 F. 2d 597 (1956).
- (4) United States Supreme Court citation: *Smith v. Jones*, 325 U. S. 196, 65 S. Ct. 1120, 89 L. Ed. 1554 (1954).
- (5) If a petition for certiorari was filed in the United States Supreme Court, disposition of the case in the Supreme Court should always be shown with parallel citations. For example: *Carson v. Warlick*, 4 Cir., 238 F. 2d 724 (1956), cert. den. 353 U. S. 910, 77 S. Ct. 665, 1 L. Ed. 2d 664 (1957).

Rule 7.

JURORS

(a) Court Techniques to Insure a Fair Trial. In every case the court will endeavor to aid in the selection of an impartial jury. However, in the trial of criminal cases calculated to attract substantial public interest, in order to shield the jurors from prejudicial publicity and to insure the accused a fair trial, the court, on its own motion, or on the motion of either party, without disclosure of the identity of the movant, may, among other things, order a continuance, a change of venue, sequestration of jurors, sequestration of witnesses, expand the *voir dire* examination of prospective jurors and issue cautionary instructions.

(b) Examination of Jurors. The court shall conduct the examination of prospective jurors.

(c) Same: Scope.

(1) In conducting the examination of jurors in civil cases, the court shall interrogate the jurors in such a fashion and manner as reasonably calculated to elicit from the jurors any prior knowledge of the case, and any connection they might have with the litigants and their attorneys, either personally, professionally, socially, economically or otherwise. The jurors shall also be asked if they know of any reason why they could not sit with the other jurors, hear the evidence in the case, the arguments of counsel, and the instructions of the court, and then render to each of the parties a fair and impartial trial and verdict.

(2) In criminal cases, the line of questioning set out in subsection (b) (1) of this rule shall be followed, where appropriate, and in addition the court shall determine whether any juror is or has been a law enforcement or peace officer.

(d) Same: Questions Requested by Counsel. After the court has completed its interrogation, counsel may request additional questions to be asked the jurors. If deemed by the court to be proper, the jurors will then be interrogated with respect to the matters requested by counsel.

(e) Jury Lists.

(1) The entire list of names drawn to serve a division of the court for a particular period may be disclosed to counsel for the parties, or to any party acting *pro se*, unless the court directs otherwise. As for jurors assigned for service on particular cases or particular days, disclosure shall not be made unless the court directs otherwise. However, no juror shall be approached, either directly or through any member of his immediate family, in an effort to secure information concerning his background.

(2) When the jurors report for duty at a session of court, the clerk shall make available to counsel for the parties, or to any party acting *pro se*, a jury list which sets forth the name, general address and occupation of each juror.

(f) Instructions to Jury. In all cases tried by a jury, the points on which either party desires the jury to be instructed must be in writing and furnished to the court before jury arguments commence.

Rule 8.**JURY ARGUMENTS**

In all trials, civil and criminal, the right to open and close the argument shall belong to the party who has the burden of proof, without regard to whether the defendant offers evidence. Where each of the parties has the burden of proof on one or more issues, the court, in its discretion, shall determine the order of arguments. All arguments shall be subject to such time limitations as might be imposed by the court.

Comment: See *United States v. Grannis*, 4 Cir., 172 F. 2d 507, 512 (1949).

Rule 9.**TRANSCRIPT OF PROCEEDINGS**

Pursuant to authorization of the Judicial Conference, upon request of any party, court reporters will furnish transcripts of all proceedings at the following rates per page:

	<i>Original</i>	<i>Each Copy</i>
Original transcript	\$1.00	\$.40
Daily copy	2.00	.50

Special arrangements must be made in advance of the trial for daily copy.

A certified copy of all transcripts must be delivered to the clerk for the records of the court without charge to the parties. Except as to transcripts to be paid for by the United States, the court reporter shall not be required to prepare transcripts without the deposit of adequate security, or to furnish such transcripts prior to the payment therefor, 28 U.S.C. § 753(f).

Rule 10.**DESIGNATION OF CONTENTS OF RECORD ON APPEAL**

Unless the parties file a written stipulation with the clerk within 20 days after notice of appeal is filed designating the papers which shall constitute the record on appeal, the clerk shall certify and forward to the court of appeals all the original papers in the file jacket dealing with the action or proceeding in which the appeal is taken. When notice of appeal is filed, the clerk shall notify the parties of the provisions of this rule.

Rule 11.**TRIAL PUBLICITY**

(a) **Photographing and Reproduction of Court Proceedings.** The taking of photographs in the courtroom or its environs, or radio or television broadcasting from the courtroom or its environs, during the progress of or in connection with judicial proceedings, including proceedings before a United States commissioner or magistrate, whether or not court is actually in session, is prohibited. The word “environs” is defined to mean the offices and corridors on floors on which are located courtrooms or offices of the United States attorney, the United States marshal, the United States district court clerk or the United States probation officer. Proceedings, other than judicial proceedings, designed and conducted as ceremonies, such as administering oaths of office to appointed officials of the court, presentation of portraits, and similar ceremonial occasions, may be photographed in or broadcast from the courtroom, under the supervision of the court.

(b) **Special Orders, Widely Publicized and Sensational Cases.** In a widely publicized or sensational case, the court on motion of either party or on its own motion, may issue a special order governing such matters as extrajudicial statements by parties and witnesses likely to interfere with the rights of the accused to a fair trial by an impartial jury, the seating and conduct in the courtroom of spectators and news media representatives, the management and sequestration of jurors and witnesses, and any other matters which the court may deem appropriate for inclusion in such an order.

Rule 12.**ORDERS AND JUDGMENTS GRANTABLE BY CLERK**

Pursuant to the provisions of Rule 77(c), Federal Rules of Civil Procedure, the clerk is authorized to grant and enter the following orders and judgments without further direction by the court, but his action may be suspended, altered or rescinded by the court for cause shown:

(1) Consent orders for the substitution of attorneys.

(2) Consent orders extending for not more than 30 days the time within which to answer or otherwise plead, answer interrogatories submitted under Rule 33, Federal Rules of Civil Procedure, or requests for admission as provided for in Rule 36, Federal Rules of Civil Procedure. Matters in bankruptcy and those matters set forth in Rule 6(b), Federal Rules of Civil Procedure, are not included in this authorization.

(3) Consent orders extending for not more than 30 days the time to file the record on appeal and to docket the appeal in the appellate court, except in criminal cases.

(4) Consent orders dismissing an action, except in bankruptcy proceedings and in causes to which Rule 23(c) and Rule 66, Federal Rules of Civil Procedure applies.

(5) Judgments of default as provided for in Rule 55(a) and 55(b) (1), Federal Rules of Civil Procedure.

(6) Orders canceling liability on bonds.

(7) Orders changing the time of opening and adjourning court in absence of the judge.

Rule 13.**PRESENTATION OF JUDGMENTS AND ORDERS**

No judgment, decree, order, or other instrument shall be presented to the court for signing unless such instrument (1) has been consented to by all the

parties affected thereby, or (2) bears the signature of the party seeking same and some clear indication that all other interested parties have seen the instrument. If there is no objection to the form of the instrument, such should be clearly indicated. If there is objection, the basis of the objection should be stated on the instrument itself or in a memorandum attached thereto. All appealable judgments, decrees or orders shall be executed in duplicate and filed with the clerk of this court.

Rule 14.

REMOVAL OF PAPERS FROM THE CUSTODY OF THE CLERK

Papers on file in the office of the clerk shall be produced pursuant to a subpoena from any court directing their production, or in the discretion of the clerk, may be temporarily removed by the United States attorney, the referee in bankruptcy, or for the court. Otherwise, papers may be removed from the files only upon order of the court. Whenever papers are withdrawn, the person receiving them shall leave with the clerk a signed receipt identifying the papers taken.

Rule 15.

CUSTODY AND DISPOSITION OF MODELS, EXHIBITS AND DEPOSITIONS

(a) **Custody.** All models, diagrams, exhibits, depositions and other material admitted in evidence or filed in any cause shall be placed in the custody of the clerk, unless otherwise ordered by the court.

(b) **Removal.**

(1) All models, diagrams, exhibits, depositions or other material placed in the custody of the clerk shall be removed by the party offering such evidence, or filing such materials, except as otherwise directed by the Court, within 30 days after judgment becomes final. At the time of removal, a detailed receipt shall be given to the clerk and filed in the case jacket.

(2) If the party offering, or filing, models, diagrams, exhibits, depositions or other material fails to remove such materials as provided herein, the clerk shall write the attorney of record, or if none, the party offering the evidence, calling attention to the provisions of this rule. If after the mailing of such notice the materials have not been removed within 30 days, they may be destroyed by the clerk.

Rule 16.

COURT LIBRARY

Attorneys practicing before this court, the United States attorney or any member of his staff, and law enforcement officers of the government, may borrow books in the court library for use in the library or courtroom. Under no circumstances may books be removed from the courthouse. Persons removing books from the library pursuant to this rule shall be responsible for their immediate return.

II. Civil Rules

[*Cite these Rules as: Local Rule*]

Rule 17.

FORM OF PLEADINGS AND DOCUMENTS

(1) All pleadings and papers submitted for filing must designate the case number of the action and fully conform to the provisions of Rules 10 and 11, Federal Rules of Civil Procedure.

(2) Where the complaint discloses that none of the plaintiffs or defendants is a resident of the division in which the complaint is captioned for filing, the clerk shall change the caption so as to designate the filing of the complaint and the issuance of the summons in a division in which one of the plaintiffs or one of the defendants reside. The clerk shall promptly notify the plaintiff, or his counsel, of the division in which the case has thus been docketed. The same procedure shall be followed in civil cases removed from the state courts to the district court.

(3) Each paper presented to the clerk for filing shall be flat and unfolded, without manuscript cover, and firmly bound.

Rule 18.

FILING FEE AND SECURITY FOR COSTS

(a) **Initiating Civil Actions.** In every civil action commenced in this court, there shall be filed with the complaint:

(1) A \$15.00 filing fee, and

(2) A \$200.00 bond, or cash deposit of \$200.00 in lieu of such bond, as security for costs.

(b) **Removal of Actions From State Courts.** In every action removed from a state court to this court, there shall be filed with the record being removed:

(1) A \$15.00 filing fee, and

(2) A \$200.00 removal bond, or a cash deposit of \$200.00 in lieu of such bond, as security for costs as required by 28 United States Code § 1446(d).

Rule 19.

FILING OF PAPERS AND SERVICE

(a) **Filing of Papers or Pleadings.** Subsequent to the institution of an action, with the exception of papers filed with the judge as provided in Rule 5(e), Federal Rules of Civil Procedure, the original of all pleadings, motions, notices of hearing and other papers shall be filed with the clerk at Greensboro, North Carolina.

(b) **Service of Papers.**

(1) Except in patent, trade-mark and anti-trust cases, and cases in which the United States is a party, it shall be the responsibility of counsel filing papers to serve *one* copy on each opposing party or his counsel.

(2) In patent, trade-mark and anti-trust cases, *two* copies of all papers shall be served on each opposing party or his counsel.

(3) In cases in which the United States is a party, in addition to the copies of the summons and complaint required by Rule 4(d) (4) and 4(d) (5) Federal Rules of Civil Procedure, *three* copies of each pleading or other paper shall be served on the United States attorney.

(c) **Proof of Service.** Proof of service may be made by written acknowledgment.

ment of service by the party served, or by a certificate of counsel for the party filing the pleading or paper, or by affidavit of the person making service, but these methods of proof shall not be exclusive. The original of all papers filed shall indicate the date and method of service.

(d) **Ex Parte Orders and Orders to Show Cause.** Whenever the court has made an *ex parte* order, the party obtaining it shall serve, within two days thereafter, a copy thereof upon each adverse party who is affected thereby, together with a copy of the papers on which the order was based. Orders to show cause shall be served within the time specified by the order.

Rule 20.

CLAIM OF UNCONSTITUTIONALITY; THREE-JUDGE COURTS

(a) If at any time prior to the trial of an action to which neither the United States nor any of its officers, agencies, or employees is a party, any party draws in question the constitutionality of an act of Congress affecting the public interest, that party, to enable the court to comply with 28 United States Code § 2403, shall notify the court in writing, stating the title of the action, the statute in question, and the respects in which it is claimed the statute is unconstitutional.

(b) In any action or proceeding required by act of Congress to be heard and determined by a district court of three judges, all pleadings, papers and documents filed subsequent to the designation of the court, as provided in 28 U.S.C., § 2284(1), shall be filed in triplicate, original and two copies, with the Clerk. The Clerk shall make timely distribution of these documents to the designated judges.

Rule 21.

MOTIONS IN CIVIL ACTIONS

(a) **Must Be in Writing.** All motions, including objections to interrogatories and requests for admissions, unless made during a hearing or trial, shall be in writing.

(b) **Grounds Must Be Stated.** All motions shall state with particularity the grounds therefor, and shall set forth the relief or order sought.

(c) **Signing.** Every motion shall be signed by at least one attorney of record who is a member of the bar of this court. The attorney shall state his office address and telephone number immediately following his signature. The signature of an attorney constitutes a certificate by him that he has read the motion; that to the best of his knowledge, information and belief, there are good grounds to support it; and that the motion is not interposed for delay.

(d) **Service.** The movant and respondent shall serve copies of their respective papers upon opposing counsel before they are filed with the clerk, and such papers must indicate the time and method of service.

(e) **Hearings.**

(1) Oral arguments on motions may be had upon written request therefor, or the court may, in its discretion, order oral arguments on any motion. A request for oral arguments shall be separately stated by the movant or respondent at the conclusion of the motion or response. If neither party requests oral arguments, the motion will be considered and decided without a hearing, unless otherwise ordered by the court. Uncontested motions will not be denied without giving the movant an opportunity to be heard.

(2) If the respondent filed a timely response, including brief, and oral arguments have been requested or ordered, the arguments shall be heard on the date

and at such place within the district as the court may designate, without regard to the division in which the case is pending.

(3) The clerk shall give at least five days' notice of the date and place of hearings on motions; provided, for good cause shown, the court may advance the date of hearing and shorten the notice period herein specified. Since it is the policy of the court to hear and dispose of motions as early as possible, the place and date of any hearing should not be specified in the motion papers.

(f) Movants Supporting Documents and Briefs.

(1) When allegations of facts not appearing of record are relied upon in support of a motion, all affidavits, depositions and other pertinent documents then available shall accompany the motion. All such documents not then available may be filed within the time prescribed by subsection (h) of this rule.

(2) All motions, other than those enumerated in subsection (i) of this rule, shall be accompanied by a brief, which shall contain a concise statement of reasons in support of the motion and citation of authorities upon which the movant relies. If the time for filing supporting documents is extended in the manner prescribed in subsection (h) of this rule, the brief of the movant need not be filed until the date specified in the extension order or stipulation.

(g) Response to Motions and Briefs. If the respondent opposes a motion, and his supporting documents are then available, he shall file his response, including brief, within twenty days after service of the motion. If supporting documents are not then available, he may file his response, including brief within the time prescribed by subsection (h) of this rule. For good cause appearing therefor, a respondent may be required to file his response and supporting documents, including brief, within such shorter period of time as the court may specify. All responses, except with respect to those motions enumerated in subsection (i) of this rule, shall be accompanied by a brief, which shall contain a concise statement of reasons in opposition to the motion and a citation of authorities upon which the respondent relies.

(h) Extension of Time for Filing Supporting Documents and Briefs. When it is reasonably shown in the motion or response, or in a written request, that the filing of additional affidavits, depositions or other documents in support or opposition to a motion is necessary, and such documents are not then available, the clerk may enter an *ex parte* order specifying the time within which such additional documents shall be filed, or approve such stipulation in regard thereto as may have been executed by counsel for the parties. Additionally, such order or stipulation shall specify the time within which the response, and briefs of the parties, must be filed. A copy of any *ex parte* order so entered shall immediately be served upon opposing counsel. If the motion is accompanied by brief and supporting documents, if such are required, and the respondent should require additional time to file his response, including brief and supporting documents, the application for additional time shall be filed by the respondent within five days from date of service of motion.

(i) Motions Not Requiring Briefs. No brief is required by either movant or respondent, unless otherwise directed by the court, with respect to the following motions: (1) For extension of time for the performance of an act required or allowed to be done, provided request therefor is made before the expiration of the period originally prescribed, or as extended by previous orders; (2) to continue a pre-trial conference, hearing or motion, or the trial of an action; (3) for a more definite statement; (4) to strike; (5) to make additional parties; (6) to amend pleadings; (7) to file supplemental pleadings; (8) to appoint next friend or guardian *ad litem*; (9) to intervene; (10) for substitution of parties; (11) relating to discovery, including, but not limited to, motions for the production and inspection of documents, specific objections to interrogatories, motions to com-

pel answers or further answers to interrogatories, and motions for physical or mental examination; and (12) to stay proceedings to enforce judgment. All the motions herein referred to, while not required to be accompanied by a brief, must state the grounds therefor and cite any applicable rule, statute, or other authority justifying the relief sought.

(j) Motions for Production and Inspection and Motions for Physical or Mental Examination. Motions for production and inspection of documents, and motions for the physical or mental examination of a party, must be supported by a showing of good cause.

(k) Conference of Attorneys with Respect to Motions and Objections Relating to Discovery. To curtail undue delay in the administration of justice, the court shall hereafter refuse to hear motions and objections relating to discovery and production of documents, pursuant to Rules 26 through 37, Federal Rules of Civil Procedure, unless moving counsel shall first advise the court in writing that after personal consultation and sincere attempts to resolve differences they are unable to reach complete accord. The statement shall set forth the date of the conference, the names of the participating attorneys and the specific results achieved. It shall be the responsibility of counsel for the movant to arrange for the conference, and in the absence of an agreement to the contrary, the conference shall be held in the office of the attorney nearest the court in the division in which the action is pending.

(l) Motions for Continuance. Motions to continue a pre-trial conference, hearing on a motion, or the trial of an action shall not be granted by the mere agreement by counsel. Any such motion, verbal or written, must be considered by the court, and no such continuance will be granted other than for good cause and upon such terms and conditions as the court may impose.

(m) Motions for an Extension of Time to Perform an Act. All motions for an extension of time to perform an act required or allowed to be done within a specified time must show prior consultation with opposing counsel, and the views of opposing counsel with respect to the extension. Such extensions will not be allowed unless the motion is made before the expiration of the period prescribed for the performance of the act, except upon a showing of excusable neglect. All stipulations with respect to extensions of time are subject to the approval of the court. Consent orders extending the time for the performance of an act may be signed by the clerk to the extent provided by Local Rule 12. Extensions for the completion of discovery will only be approved upon a showing of prior good faith and reasonable diligence. Extensions to file answers or other responsive pleadings will not be granted beyond a total of 30 days from the date the answer or other responsive pleading was originally required to be filed, except upon a showing of unusual circumstances and good cause.

(n) Failure to File and Serve Motion Papers. If briefs are required, the failure of the movant or respondent to file a brief, or the failure of a respondent to file his response, within the times specified in this rule, shall constitute a waiver to file thereafter such brief or response, except upon a showing of excusable neglect. A motion unaccompanied by a brief, when a brief is required, may, in the discretion of the court, be summarily denied. A response unaccompanied by a brief, when a brief is required, may, in the discretion of the court, be disregarded and considered and decided as an uncontested motion. If a respondent fails to file his response within the time required by this rule, the motion will be considered and decided as an uncontested motion, and normally will be granted without notice to the parties.

(o) Sanctions. Should any party fail or refuse to meet and confer in a good faith effort to resolve or narrow the area of disagreement with respect to discovery motions, or otherwise willfully fail or refuse to comply with other provisions of this rule, the court may, in its discretion, in addition to the other sanctions

provided for by this rule, and the Federal Rules of Civil Procedure, impose counsel fees against the defaulting party.

Rule 22.

PRE-TRIAL AND DISCOVERY IN CIVIL CASES

(a) Requirement for Pre-Trial. There shall be an initial and a final pre-trial conference in every civil case, unless counsel for the parties stipulate in writing to the contrary and the court approves the stipulation. The court, in the interest of justice and good administration, upon its own motion, may dispense with the initial or final pre-trial conference. In lieu of or in addition to a formal final pre-trial conference, the court may require the parties to submit a proposed final pre-trial conference order in advance of the noticed day for the final pre-trial conference.

(b) Initial Pre-Trial Conference. The initial pre-trial conference shall be held at the earliest practicable date following the joinder of issues.

(c) Order on Initial Pre-Trial Conference. At the time of, or immediately following, the initial pre-trial conference, the court will prepare and enter an order with respect to the subject matter considered at the conference.

(d) Counsel Preparation for Initial Pre-Trial Conference. Counsel for the parties should come to the initial pre-trial conference prepared to express themselves effectively with respect to the following:

- (1) The time reasonably required for the completion of discovery.
- (2) Whether any third-party complaint or impleading petition is contemplated.
- (3) Whether all parties defendant have been properly served with process.
- (4) Whether there is any question concerning jurisdiction of the parties and of the subject matter.
- (5) Whether all parties plaintiff and defendant have been correctly designated.
- (6) Whether there is any question concerning misjoinder or non-joinder of the parties.
- (7) Whether there is necessity for, or question concerning the validity of the appointment of, guardian *ad litem*, next friend, administrator, executor, receiver, or trustee.
- (8) Whether there are pending motions.
- (9) Whether a trial by jury has been demanded within the time provided by the Federal Rules of Civil Procedure.
- (10) Whether a separation of issues would be feasible or desirable.
- (11) If there is to be a separation of issues, whether discovery should be limited to the issue or issues first to be tried.
- (12) Whether there are related actions pending or contemplated in this or any other court.
- (13) The estimated trial time.

(e) Final Pre-Trial Conference. A final pre-trial conference will be held at the earliest practicable date after the completion of discovery, at which time a final pre-trial order will either be entered or formalized.

(f) Use of Discovery Procedures. Attorneys are expected to make the fullest possible use of all discovery procedures provided for by Rules 26 through 37, Federal Rules of Civil Procedure, rather than seek information or admissions at the conference of attorneys or at the final pre-trial conference.

(g) Completion of Discovery. The requirement that discovery be completed within a specified time means that adequate provision must be made for interrogatories and requests for admission to be answered, documents to be pro-

duced, and depositions to be transcribed, within the discovery period fixed in the initial pre-trial order.

(h) **Extension of Time for Discovery.** Upon motion, if made prior to the expiration of the time within which discovery is required to be completed, time may be extended for completion of discovery. Motions or stipulations for additional time for the completion of discovery must set forth good cause justifying the additional time. Parties are expected to conform to prescribed schedules, and motions for extension of time will only be granted in unusual cases, and upon a showing that the parties have diligently pursued discovery during the period originally specified. For good cause appearing therefor, the physical or mental examination of a party may be ordered at any time prior to trial. The deposition of material witnesses who agree to appear at the trial, but who later become unable to attend by reason of illness, or refuse to attend by reason of not being subject to subpoena, may be ordered at any time prior to trial. Except under unusual circumstances, the deposition of material witnesses not subject to subpoena should be taken during discovery.

(i) **Notice.** The clerk shall give at least ten days' notice of the initial pre-trial conference, and thirty days' notice of the final pre-trial conference. The thirty-day notice required for final pre-trial conference may be given prior to the expiration date of the completion of discovery, but the time fixed for the conference shall be at least twenty days after the final date for the completion of discovery.

(j) **Conference of Attorneys.** At least fifteen days prior to the final pre-trial conference, counsel for each of the parties who will participate in the trial shall meet and confer for the purpose of preparing a final pre-trial order. It shall be the duty of counsel for the plaintiff to arrange for the conference. In the absence of an agreement to the contrary, the conference shall be held in the office of the attorney maintaining an office in this district nearest the court in the division in which the action is pending. In advance of the conference, each of the parties shall prepare, in typewritten form, and have available at the conference, for inclusion in the final pre-trial order, the following:

(1) *Contentions of Plaintiff(s).* A brief statement of the contentions of plaintiff(s) as to the basis of recovery.

(2) *Contentions of Defendant(s).* A brief statement of how defendant(s) expects to defeat recovery, and basis for any asserted counterclaim.

(3) *Contentions of Cross-Claimant(s) and Third-Party Defendant(s).* Cross-claimant(s) and third-party defendant(s) shall follow the same procedure required of plaintiff(s) and defendant(s).

(4) *Suggested Stipulations.* Suggested stipulations covering all relevant and material facts not considered to be in genuine dispute. In most instances, it would probably conserve time for counsel to have a preliminary conference for the purpose of agreeing upon undisputed facts, thereby eliminating the necessity for each of the parties preparing suggested stipulations.

(5) *Exhibits.* A list of all exhibits that may be offered at the trial, with a brief description of each exhibit. All exhibits must be marked for identification, and, whenever possible, a copy furnished opposing counsel, unless opposing counsel already has a copy of the exhibit or stipulates a waiver of this requirement. In the event certain exhibits are of the character which prohibit and make impracticable their reproduction, notice of their intended use shall be given, and satisfactory arrangements made to afford opposing counsel an opportunity to examine such exhibits. The final pre-trial order should contain the stipulations of the parties with reference to the admissibility in evidence of all identified exhibits, and the provision made for the inspection of any exhibit not furnished opposing counsel. If the authenticity of any exhibit is not stipulated, the reason therefor

should be stated. If admissibility is not stipulated, the basis of the objection must be stated with particularity.

(i) If counsel thereafter discovers additional exhibits which were not known at the time of the conference, the same information required to be disclosed at the conference shall immediately be furnished opposing counsel. The original of any such disclosure shall be filed with the court at the time a copy is furnished opposing counsel.

(ii) Illustrative diagrams, drawings or models, even though not previously identified as exhibits, may, in the discretion of the court, be used and received in evidence.

(6) *List of Witnesses.* A list of the names and addresses of all witnesses then known who may be offered at the trial, together with a brief statement of what counsel proposes to establish by the testimony of each witness. Only each material point which counsel proposes to establish by the testimony of each witness needs to be disclosed, but the willful failure to disclose a material point may render evidence on that point inadmissible at the trial. If counsel discovers the names of additional witnesses that were not known at the time of their conference, the same information required to be disclosed at the conference shall immediately be furnished opposing counsel. The original of any such disclosure shall be filed with the court at the time a copy is furnished opposing counsel.

(i) One of the fundamental purposes of this rule is to require advance preparation sufficient to enable counsel to list the names of all witnesses likely required to establish his claim or defense, and a good faith effort should be made to carry out this purpose when listing the names of witnesses who may be offered at the trial. However, since witnesses listed by all the parties presumably have knowledge bearing upon some of the contested issues, it is permissible for counsel to call as a witness any person listed as a witness by any party to the action. While counsel has the right to call as a witness any person listed by another party, this right should be exercised only in those instances where knowledge of the necessity for calling such witness first arises during the course of the trial.

(ii) The court may, in its discretion, and in the interest of justice, permit a party to call and examine a witness not listed by any party. This exception to the rule is intended to cover only those instances where, during the course of the trial, it becomes necessary to impeach or rebut the testimony of a listed witness, or to meet unexpected developments at the trial.

(iii) All listed witnesses who are subject to subpoena shall be produced at the trial, unless good cause is shown for their absence, and a good faith effort must be made to produce all witnesses who are not subject to subpoena. If at any time prior to trial, it is determined that any listed witnesses cannot be produced, immediate notice of such fact must be given opposing counsel. If the same person is listed as a witness by a plaintiff and another party, it shall be the responsibility of such plaintiff to produce the witness at the trial. If the same person is listed as a witness by a defendant and another party, other than a plaintiff, it shall be the responsibility of such defendant to produce the witness at the trial. If a party lists as a witness an adverse party, or an officer, director, or managing agent of an adverse party, not subject to subpoena it shall be the responsibility of such adverse party to produce the witness at the trial.

(iv) The parties may enter into any reasonable stipulations concerning the specific date or hour a witness will be produced, and reasonable stipulations with respect to excusing witnesses after they have testified, or after it has been determined that a witness will not be called.

(v) If a deposition is to be used at the trial, the individual giving the deposition should be listed as a witness. If the entire deposition is not to be offered the portions that will be offered should be indicated. If there is a dispute as to the admissibility of any deposition testimony, and the parties are unable to resolve the dispute, the court will endeavor to resolve the matter at the final pre-trial conference.

(7) **Triable Issues.** A list of the triable issues as contended by counsel for each of the parties. If any issues raised by the pleadings have been abandoned, notice shall be given of this fact. Every effort shall be made to resolve any disagreements as to the triable issues, whether to the court or the jury, to the end that the triable issues might be stipulated in the final pre-trial order.

(k) **Discussion of Settlement Possibilities.** At the time of the conference referred to in subsection (j), counsel for each of the parties shall enter into a frank discussion concerning settlement possibilities. In appropriate cases, clients should either be consulted in advance of the conference concerning settlement figures, or be available for consultation. If settlement appears likely, it should be accomplished as early as possible so as to eliminate the necessity of preparing the final pre-trial order. Settlement prospects will be discussed at the final pre-trial conference, and counsel should be fully prepared in this regard. The court will aid in settlement negotiations to the extent requested by the parties.

(1) **Final Pre-Trial Order.** At the time of, or immediately following, the conference of attorneys, it shall be the duty of counsel for the plaintiff(s) to prepare a final pre-trial order for presentation to the court at the time of the final pre-trial conference. A copy of the proposed final pre-trial order shall be furnished all opposing counsel at least five days in advance of the final pre-trial conference. The form of the order shall conform as nearly as possible, depending upon the nature of the case and the issues involved, to Form 1, Appendix of Forms. The form shall be used as a guide and check list, and all matters suggested by the form, if relevant, together with other matters, depending on the nature of the case, that will serve to clarify and simplify the contested issues, shall be referred to, and the position of the parties made clear, in the final pre-trial order. Illustrative of this requirement, particular reference is made to the obligation of counsel with respect to contract and negligence cases.

(1) In the event there are motions to be ruled upon, or other matters for consideration and determination at the final pre-trial conference, such matters, and any requirements with respect to the filing of trial briefs or requests for jury instructions, will be incorporated in a memorandum dictated by the Court at the conclusion of the final pre-trial conference. The actual or tentative trial date will also be included in the memorandum.

(2) When the final pre-trial order has been completed, counsel for all the parties shall affix their signatures with respect to stipulations, agreements and claims set forth in the order. The order, when approved by the Court and filed with the Clerk, together with any memorandum entered at the conclusion of the final pre-trial conference, will control the subsequent course of the action, unless modified by consent of the parties and the Court, or by an order of the Court, to prevent manifest injustice.

(m) **Sanctions.** Should counsel fail to appear at any pre-trial conference, either initial or final, or fail to comply in good faith with the provisions of this rule relating to the preparation of the final pre-trial order, or fail to comply in good faith with any of the other provisions of this rule, an *ex parte* hearing, in the discretion of the court, may be held, and judgment of dismissal or default, or other appropriate judgment, entered, or other sanctions may be invoked, including but not limited to, the imposition of attorney's fees against the defaulting attorney, or his client, or both. A willful failure to reveal exhibits and names of witnesses may render such exhibits and the testimony of such witnesses inadmissible at the trial.

Rule 23.

SEPARATION OF ISSUES IN CIVIL CASES

Pursuant to and in furtherance of Rule 42(b), Federal Rules of Civil Pro-

cedure, in order to avoid undue delay in the administration of justice in civil litigation wherein the issue of liability may fairly be adjudicated as a prerequisite to the determination of other issues, in jury and nonjury cases, the court, upon motion of any of the parties, or upon its own motion may order a separate trial upon the issue of liability in any claim, cross-claim, counterclaim, or third-party claim. In the event liability is sustained, the court may recess for pre-trial or settlement conference, or may proceed with the trial before the same or another jury, on any or all of the remaining issues, as conditions may require and the court shall deem just and proper.

Rule 24.

MINORS AND INCOMPETENTS AS PARTIES

(a) Appearance.

(1) In any civil action where any of the plaintiffs are minors or incompetents, whether residents or nonresidents of this state, they must appear by their general or testamentary guardian, if they have one within the state.

(2) In any civil action where any of the defendants are minors or incompetents, whether residents or nonresidents of this state, they must appear by their general or testamentary guardian, if they have one within this state.

(b) Appointment of Next Friend or Guardian Ad Litem.

(1) If a minor or incompetent plaintiff has no general or testamentary guardian in this state, said party shall appear by his next friend, who may be appointed as provided for in Rule 17(c), Federal Rules of Civil Procedure. The appointment of a next friend shall be made upon proper application in writing, and after due consideration by the court.

(2) If a minor or incompetent defendant has no general or testamentary guardian in this state, and he has been served with summons as provided for in Rule 4(d) (2), Federal Rules of Civil Procedure, the court, upon motion in writing of any of the parties, or upon its own motion, will appoint a capable and trustworthy person to act as guardian *ad litem*, and shall make such other orders as it deems proper for the protection of the minor or incompetent, as provided for in Rule 17(c), Federal Rules of Civil Procedure.

(c) Supervision and Removal of Next Friend or Guardian Ad Litem.

The next friend of a minor or incompetent, or the guardian *ad litem* of a minor or incompetent, is an officer of the court and shall function under the supervision and control of the court. The court may remove the next friend or the guardian *ad litem* as often as may be necessary to protect the rights of minors and incompetents.

(d) **Dismissal of Actions.** No action to which a minor or incompetent is a party shall be discontinued or dismissed without the approval of the court. A motion for dismissal of the action shall be in writing and shall set forth the reasons why the action should be dismissed, and the effect of the dismissal, if any, upon the rights of the minor or incompetent.

(e) **Settlement of Claims of Minors or Incompetents.** All settlements of claims of minors or incompetents must be approved by the court. No settlement of such claims shall be presented to the court until the issues are joined. If any party to the action has requested a jury trial, a stipulation of the parties withdrawing such request shall be filed with the court.

(f) Same: Hearings.

(1) Upon oral or written motion of the parties, the court will conduct a hearing to determine whether the settlement is fair and reasonable and for the best interests of the minor or incompetent.

(2) At the time of the hearing, the attorneys for the parties shall present, to the satisfaction of the court, the following:

(i) A statement of the facts giving rise to the cause of action set forth in the pleadings, the contentions of the parties with respect to liability, and a stipulation covering all relevant and material facts not considered to be in genuine dispute.

(ii) A statement showing the nature and extent of the injuries, the extent of the recovery from such injuries, and the prognosis. Such statement shall be supported by copies of all pertinent medical reports, including a current report of the attending physician.

(iii) Statements of the attorney and parents or guardian of the minor or incompetent as to their satisfaction with the settlement, and their opinion as to the fairness and reasonableness of such proposed statement. If at least 18 years of age, a similar statement shall be presented by any minor plaintiff.

(iv) If material, a statement showing the amount of the medical, hospital and other expenses incurred, or to be incurred, in the treatment of the injuries of the minor or incompetent.

(3) If deemed necessary, the parties should also be prepared to offer sworn testimony of witnesses and furnish documentary evidence in support of all findings made by the court.

(g) Judgments Approving Settlement.

(1) To be consented to. Before judgments approving compromise settlements of claims of minors or incompetents shall be presented to the court, the judgment shall be consented and agreed to by counsel for all parties to the action, by the next friend or guardian of the minor or incompetent and, in cases where the minor is at least 18 years of age, by the minor plaintiffs.

(2) Contents. The judgment presented should provide, *inter alia*, that the parties have agreed to a settlement of all matters in controversy between them and the amount of the settlement; that the court has investigated the matter of the proposed settlement and considered the evidence offered by the parties; that the court is of the opinion, and finds as a fact, that the proposed compromise settlement is fair and reasonable and is for the best interests of the minor or incompetent; and that the court is of the opinion, and finds as a fact, that the compromise settlement agreement should be ratified, approved and confirmed by the court.

(h) Payment of Medical Expenses From Proceeds of Judgment. The court will not order the payment of medical expenses from the proceeds of the judgment unless (1) a parent is the next friend of the minor and the parent has waived his right to the medical expenses, permitting the minor to recover all elements of damage in the action, (2) the minor has no parent or legal guardian, or (3) the minor is emancipated and liable for necessities.

(i) Same: Reimbursement to Parent.

(1) In cases where all or any part of the medical bills have been paid by the parent, the court will not authorize that the parent be reimbursed from the proceeds of the judgment, except in extraordinary circumstances. If the parent is to be reimbursed, settlement of the parent's claim should normally be separate and apart from the settlement of the minor's claim.

(2) Except in extraordinary circumstances, the settlement of the claim of the parent for medical expenses incurred in the treatment of injuries to the minor, and the loss of services of the minor, should be separate and apart from the claim of the minor. In cases where the settlement of the claim of the parent is separate and apart from that of the minor, the judgment should recite that there has been such a settlement.

(j) **Counsel Fees Subject to Approval of Court.** In all actions falling within the purview of this rule, the court shall approve or fix the amount of the fee to be paid to counsel for the plaintiff and will make appropriate provision for the payment thereof from the proceeds of the judgment. Counsel for plaintiff shall be prepared to submit to the court the nature and extent of the services rendered to the incompetent or minor plaintiff, and his opinion as to the value thereof, if requested by the court.

(k) **Payment of Judgment.** The amount of the judgment shall be paid into the office of the clerk of this court and the clerk shall make such disbursements from the proceeds as provided by the judgment of the court. The balance of the proceeds of the judgment shall be paid to the legal guardian of the minor or incompetent, if within this state. If there is no such guardian, the balance of the proceeds shall be paid to the clerk of superior court of the county in which the minor or incompetent resides.

Rule 25.

OPENING STATEMENTS IN CIVIL ACTIONS

At the commencement of the trial of civil actions, the party upon whom rests the burden of proof shall state, without argument, his cause of action and the evidence by which he expects to sustain his claim. The adverse party shall then state, without argument, his defense and the evidence by which he expects to sustain same. If the trial is to the jury, the opening statement shall be made immediately after the jury is empaneled. If the trial is to the court, the opening statement shall be made immediately after the case is called for trial. Opening statements shall be subject to such time limitations as might be imposed by the court.

Rule 26.

RETURN OF CIVIL VERDICTS

In civil jury trials, if a party or counsel voluntarily absents himself from the courtroom prior to the return of the verdict, it shall be conclusively presumed that such party or counsel waived his presence.

Rule 27.

TAXATION OF COSTS

(a) **Bond Premiums.** If costs are awarded by the court, the reasonable premiums or expense paid on any bond or other security given by the prevailing party shall be taxed as part of the costs.

(b) **Witnesses, Fees, Subsistence and Mileage.** Executive officers and directors of corporate parties shall not be entitled to witness fees, subsistence and mileage. In addition to the fees and subsistence authorized by statute for other witnesses, they shall be allowed their actual mileage at the statutory rate to and from their place of residence, whether they reside within or without the district.

(c) **Filing Bill of Costs.** The prevailing party shall prepare a bill of costs as soon as possible after entry of the final judgment, on the form supplied by the clerk. The bill of costs shall contain an itemized schedule of the costs, and a statement signed by counsel for the prevailing party that the schedule is correct and the charges were actually and necessarily incurred. The original of the bill of costs shall be filed with the clerk and a copy served on counsel for the adverse party.

(d) Objections to Bill of Costs, Hearing and Review.

(1) If an adverse party makes specific objections to any item of costs filed by the prevailing party, the clerk shall set the matter for hearing.

(2) If either party is dissatisfied with the ruling of the clerk, such action may be reviewed by the court upon motion duly made in writing within five days after the action of the clerk.

III. Criminal Rules

[*Cite these Rules as: Local Rule*]

Rule 28.**PRE-TRIAL OF CRIMINAL CASES**

In protracted criminal cases involving unusual facts and issues, or the use of numerous exhibits, the court, upon motion of either party, or upon its own motion, may suggest a pre-trial conference for the purpose of considering the stipulation of undisputed facts and exhibits, and such other matters as will promote a fair and expeditious trial.

Rule 29.**MOTIONS IN CRIMINAL CASES**

Unless a different time is fixed by statute or the Federal Rules of Criminal Procedure, motions in criminal cases, and particularly motions made pursuant to Rules 12, 21 and 41(e), Federal Rules of Criminal Procedure, shall be in writing and state with particularity the grounds therefor and the relief or order sought. All such motions shall be filed with the clerk, and a copy served upon the United States attorney, at least five days prior to the date of arraignment, and accompanied by a brief citing all authorities upon which the movant relies. The court, may, however, in unusual or exceptional circumstances, and for good cause shown, allow such motions to be made at a time later than that fixed by this rule.

Comment: See Local Rule 6 with respect to briefs.

Cited in *United State v. Vickers*, 387
F.2d 703 (4th Cir 1967).

Rule 30.**ARRAIGNMENT**

All defendants and their attorneys shall be present for arraignment at 10 o'clock a.m. on the opening day of each regular session of court in the division in which the case is pending.

Rule 31.**OPENING STATEMENTS IN CRIMINAL ACTIONS**

In the trial of protracted criminal cases involving unusual or complicated facts or issues, the government and the defendant may make opening statements with reference to their theories of the case and the manner in which they expect to offer their proof. Opening statements shall be subject to such time limitations as might be imposed by the court.

Rule 32.**PLEAS IN MITIGATION OF PUNISHMENT**

All pleas in mitigation of punishment in criminal cases shall be made in open

court during the trial of the case, and at a time when the United States attorney, or his assistant in charge of the prosecution, is present.

Rule 33.

MOTIONS FOR REDUCTION OF SENTENCE

All motions for reduction of sentence, pursuant to provisions of Rule 35, Federal Rules of Criminal Procedure, if not in writing, shall be made orally in open court in the presence of the United States attorney, or his assistant in charge of the prosecution of the case. If the motion is in writing, the original shall be filed with the clerk and a copy thereof served upon the United States attorney. Only substantial facts unavailable to the defendant, or not brought to the attention of the court, at the time of sentencing will be considered.

Rule 34.

POST-CONVICTION MOTIONS

Motions filed pursuant to 28 United States Code § 2255 making a collateral attack upon a sentence imposed by this court, and petitions for writs of habeas corpus filed in this court by persons in state custody, shall be in writing, signed and verified. Additionally, such motions and petitions shall be on forms supplied by the court, and, to the extent applicable, all information required by the form shall be fully and accurately given.

Rule 35.

REPRESENTATION OF INDIGENT DEFENDANTS

The plan of the court for the representation of defendants who are financially unable to obtain an adequate defense, and for the furnishing of expert and other services, pursuant to the Criminal Justice Act of 1964, provides for representation by private attorneys. For the purpose of preparing and certifying panels of attorneys from which appointments will be made, the Court has appointed a District Committee, and Division Committees in each of the six divisions of the district, composed of experienced attorneys. A member of the District Committee resides in each of the six divisions of the court, and Division Committees have a member from each county in each division. Local bar associations have also been invited to participate in the preparation and certification of panels of attorneys from which appointments will be made. Because of the length of the plan, it is not being reproduced in these rules. A copy is available, however, through the clerk. Every effort has been made to insure that all qualified members of the Bar will be given an equal opportunity to participate in the representation of defendants under the Act. The panels will be revised annually. The court may, in the exercise of its discretion, appoint attorneys to represent defendants under the Act whose names do not appear on the panels.

IV. Bankruptcy Rules

[Cite these Rules as: Local Rule]

Rule 36.

FILING FEES

(a) **Original Petition.** At the time of filing the petition initiating a proceeding under the Bankruptcy Act, the filing fees, except as provided in subsection (d) of this rule, shall be deposited with the clerk of court as follows:

(1) For ordinary bankruptcy of an individual or a corporation, \$50.00. In partnership cases, \$50.00 for each partner and \$50.00 for the partnership.

(2) For an arrangement under Chapter XI, \$50.00.

(3) For a real property arrangement under Chapter XII, \$50.00.

(4) For corporate reorganization under Chapter X, \$120.00, if no bankruptcy proceeding. Otherwise, \$70.00.

(5) Railroad reorganization, under Chapter XV, \$150.00.

(6) For composition of local taxing agency under Chapter IX, \$100.00.

(7) For wage earner plan under Chapter XIII, \$15.00.

(b) Petition to Reopen Cases. To reopen any closed bankruptcy proceeding there should be a deposit with the clerk of court of the sum of \$50.00.

(c) Ancillary Proceedings. For ancillary proceedings there should be a deposit with the clerk of court of the sum of \$40.00.

(d) Petitions in Pending Cases. The filing fees for petitions in pending cases are as follows:

(1) Petition to reclaim property from a bankrupt estate, \$10.00.

(2) Petition to review an order of the referee, \$10.00.

(3) Objections to the discharge, \$10.00.

(4) Amendments to schedule of creditors after notice to creditors, \$10.00.

Comment: Filing fees for petitions filed with the referee shall accompany the petitions when filed with checks payable to the clerk of court.

(e) Changes. If any of the above filing fees are changed by the Judicial Conference of the United States, they shall be considered as automatic changes in this rule to conform to the new fees adopted by the said Conference.

Rule 37.

FILING ORIGINAL PETITIONS, SCHEDULES AND STATEMENT OF AFFAIRS

(a) Number of Copies and Place to File. In bankruptcy petitions under Chapters I through VII of the Bankruptcy Act (ordinary bankruptcy), the schedule of assets and liabilities and the statement of affairs shall be filed in triplicate originals with each of the three originals duly executed by the bankrupt and filed with the clerk of the court. In involuntary bankruptcy proceedings, the bankrupt should file with the referee within five days after adjudication the schedule of assets and liabilities and statement of affairs as required in Section 7 of the Bankruptcy Act.

Comment: Among the official forms adopted by the United States Supreme Court which have become a part of the Bankruptcy Act as found in the United States Code, are Form No. 1 which constitutes the petition and schedule of assets and liabilities, and Form No. 2 which constitutes the statement of affairs. Official Form No. 5 constitutes the petition for an involuntary proceeding. These forms, except the involuntary forms, are commercially printed and distributed rather widely and may be obtained from local legal supply houses. Hutton Office Supply Company, Bellemeade Street, Greensboro, North Carolina, Telephone: Broadway 3-2790, has agreed to carry for sale such forms at all times and to mail or deliver them to lawyers immediately upon request. Proof of claim forms are also available at the same source. For larger quantities, more economical prices can be obtained by ordering direct from printer such as Tuttle Law Print, Inc., Rutland, Vermont.

(b) Full Name and Trade Names. The bankrupt's full name shall be set out in the petition. In voluntary bankruptcy proceedings, all assumed, fictitious or trade names and any other names or designations by or under which the bankrupt has been known or has conducted any business within six years next pre-

ceding the filing of the petition in bankruptcy shall be set forth in the petition. In involuntary proceedings, such facts shall be set forth in the petition to the best knowledge, information and belief of the petitioning creditors. In all cases, such facts shall be set forth in the notices to the creditors of the first meeting of creditors.

(c) Listing Creditors. The list of creditors in the schedule of assets and liabilities should be accurate and complete. The street number, city and state should be listed after each creditor with sufficient accuracy to assure mail delivery.

Comment: An inadequate or incomplete mailing address may result in the bankrupt not being discharged of that indebtedness as being insufficient notice to the creditor.

(d) Inability to Pay Filing Fee. A petition in a voluntary proceeding under Chapters I through VII or Chapter XIII of the Bankruptcy Act may be accepted for filing by the clerk of court if accompanied by a verified petition by the bankrupt stating that the petitioner is without and cannot obtain the money with which to pay the filing fee in full at the time of filing, accompanied by an affidavit of the petitioner's attorney that the attorney has not and will not accept any compensation for his services as such attorney until such filing fee is paid in full. The bankrupt's petition shall state the facts showing necessity for payment of the filing fee in installments and shall set forth the times upon which the bankrupt proposes to pay such fees. No discharge shall be granted until the filing fee is paid in full.

Comment: The limitations and provisions in respect to the installments as well as the facts that the proceeding may be dismissed on failure to pay the costs is contained in General Order No. 35.

(e) Partnerships. Where a petition in bankruptcy involves a partnership, the petition should clearly indicate whether the individual partners are included among the bankrupts with the partnership and whether the partners are to be adjudged bankrupts individually along with the partnership. There shall be separate adjudications for each individual and for the partnership. Whether the partners are adjudicated individually or not, the schedule of assets and liabilities should contain a separate list of the assets and liabilities of each partner.

Comment: The discharge of a partnership shall not discharge the individual partners thereof from the partnership debts. Therefore, it is most important to the partners that the petition and the adjudication include the partners. As to the treatment of the partnership and the partners in bankruptcy, see Section 5 of the Bankruptcy Act.

(f) Personal Property Exemptions. The \$500.00 personal property exemption of the bankrupt as recognized under the laws of the State of North Carolina should be claimed by the bankrupt in the schedule of assets and liabilities. If the bankrupt does not claim the exempt property, the failure to do so will be considered a waiver of his rights to the said exemption. It will be sufficient to protect such rights to claim the \$500.00 exemption without identifying the particular property to be included in the allotment.

(g) Estates by the Entirety. When one spouse is adjudicated a bankrupt, real estate held by the entirety is not an asset of the bankrupt estate. However, the schedule of assets and liabilities as filed by the bankrupt should indicate what property is held by the entirety, giving the approximate date of purchase, the present value and the location of the property. The value of said property would not be listed in the total value of the bankrupt estate.

Rule 38.**APPEARANCE OF ATTORNEYS**

(a) **Qualified Attorneys.** Attorneys appearing before the referee, including attorneys filing proofs of claim, shall be a member of the bar of this court, as provided by Local Rule 2. Attorneys who do not maintain an office in the State of North Carolina may appear in association with members of the bar of this court. Individuals, collection agencies, corporations or associations, not a creditor, shall not be permitted to file claims. Individuals, firms and corporations which are creditors may file proofs of claim on their own behalf, without the use of an attorney.

(b) **Disposition of Claims Filed by Disqualified Persons.** Any claim received by the referee from an attorney, person or corporation disqualified to file claims as above indicated shall be filed and entered by the referee, provided the claim indicates the mailing address of the creditor. If no complete mailing address of the creditor appears on the claim, then the claim with a copy of this rule shall be returned to the disqualified party attempting to file the claim. If the claim is filed, a copy of this rule shall be forwarded by the referee to the sender of the claim to serve as notice that he is not qualified to file such a claim and will not be recognized as an attorney in this court.

Rule 39.**EMPLOYMENT OF ATTORNEYS**

A receiver or trustee shall not employ an attorney except as provided in General Order No. 44.

Rule 40.**COMPENSATION OF ATTORNEYS**

(a) **Petition for Fees.** An attorney for a receiver, trustee, petitioning creditors, bankrupt or debtor shall be allowed compensation only for services necessarily and actually rendered and expenses necessarily and actually incurred and paid. An attorney entitled to compensation for services shall file with the referee his petition setting forth the value and extent of the services rendered in detail indicating the amount requested and what amount, if any, has heretofore been paid to him.

(b) **Division of Fees.** The petition by an attorney for attorney's fee shall be accompanied by his affidavit stating whether an agreement or understanding existed between the attorney and any other person for a division of the compensation, and if so, the nature and the particulars thereof. The affidavit shall state that no division of fees will be made except as indicated therein. Such statement may be incorporated in the petition provided the petition is under oath.

Comment: If the division is with attorney's law partner, such should be indicated. However, the manner or percentage of division is not required to be disclosed. The restrictions on divisions of fees are contained in Section 62 c of the Bankruptcy Act. For a suggested form for the affidavit, see Form No. 3 in the Appendix to these rules.

(c) **Fixing Fees.** In fixing compensation of an attorney, the following factors shall be taken into consideration:

- (1) Amount of work done.
- (2) Length of time employed.
- (3) Difficulties or intricacies of the bankruptcy proceeding.
- (4) Results accomplished.
- (5) Amount involved in connection with services rendered.
- (6) Size of the estate.

(7) The skill required and experience of counsel in similar cases.

(8) Contingency or uncertainty of compensation.

(d) **North Carolina Bar Association Rates.** When computing compensation on the basis of time and depending on the importance of the case, the referee may consider the recommended minimum fee schedule of the North Carolina Bar Association.

Rule 41.

REFERENCE OF PETITIONS

In accordance with the provisions of 11 United States Code § 45(a), the clerk of court shall refer to the referee in bankruptcy all cases filed under Chapters I through VII, Chapter XI, and Chapter XIII of the Bankruptcy Act.

Rule 42.

PETITIONS, ORDERS AND PLEADINGS AFTER REFERENCE

(a) **Filed With Referee.** After a proceeding has been referred to the referee all petitions, pleadings and applications for orders within the referee's jurisdiction shall be made to the referee and filed with the referee.

(b) **Verification.**

(1) Required to be verified are petitions initiating the action in bankruptcy either voluntary or involuntary, statement of affairs, assets and liabilities, statement as to the division of fees as applied for by attorneys, trustee and receiver, and all reports by receiver and trustee in which there is an accounting of funds or reporting the expenses to be paid from the estate and power of attorney.

(2) Not required to be verified or under oath are all pleadings, petitions, motions and applications in the bankruptcy proceeding except as noted above.

Comment: The official caption and verification in bankruptcy proceedings is set forth in Form No. 2, Appendix to these rules.

(c) **Service on Trustee.** Any person filing a petition to reclaim property or for the release of any rights to property, shall serve a copy of such petition on the trustee or his attorney by mailing the same to him and attaching a statement of such service to the petition as filed with the referee.

(d) **Manuscript Covers.** Petitions, applications and orders filed with the referee should not have manuscript covers unless such covers are necessary to protect exhibits attached.

Rule 43.

PETITION FOR DISCHARGE OF BANKRUPT

(a) **Individual or Partnership.** The adjudication of an individual or a partnership operates as an application for a discharge and no further petition is necessary.

(b) **Corporation.** If a discharge of a corporation is desired, a petition for such discharge must be filed within six months after the adjudication.

Rule 44.

OBJECTIONS TO DISCHARGE

The objection to the discharge may contain one or more specifications of the grounds of opposition to such discharge. Each specification should be numbered and reference made to the applicable subparagraph of Section 14 c of the Bankruptcy Act. Each specification should allege the essential facts and all the ele-

ments constituting the bar to discharge and not merely allege generalities or conclusions. A specification alleged in the words of the statute alone is not sufficient except where the specification is under Section 14 c (2) of the Bankruptcy Act for failing to keep accounts and records from which the bankrupt's financial condition and business transactions might be ascertained.

Comment: For the \$10.00 filing fee for objections to discharge, see Local Rule 34(d) (3). Official Form No. 44, Specifications of Objection to Discharge, is set forth as Form No. 4 in the Appendix of these rules.

Rule 45.

FEDERAL RULES OF CIVIL PROCEDURE

(a) **Applicability.** The Federal Rules of Civil Procedure shall, insofar as they are not inconsistent with the Bankruptcy Act and the General Orders, be followed as nearly as may be pursuant to General Order No. 37 under the Bankruptcy Act.

(b) **Pre-Trial Conferences.** The pre-trial conference procedure under Rule 16, Federal Rules of Civil Procedure and Local Rule 22, shall be used by the referee to its fullest advantage. Request for a pre-trial conference may be made by written motion by any party to any matter being litigated before the referee in bankruptcy.

Comment: The purpose and scope of the pre-trial conference before the referee in involved and complicated matters will be similar and as binding on the parties as a pre-trial conference under Local Rule 22.

Rule 46.

FILING CLAIMS

(a) **Form.** Proof of claim should be presented on a regular proof of claim form as prescribed by the Bankruptcy Act, being Official Forms Nos. 28, 29, 30, and 31. The proof of claim should have attached to it an itemized statement of the account. If the claim is based on a note or written contract, a true copy or photostatic copy should be attached. All credits should be shown by date, character and amount within the last six months. It is not required that the claim be executed under oath, except the proof of claim should be under oath when power of attorney is included.

Comment: Commercial printers usually combine the four forms into one printed form which is used in filing claims and most frequently referred to as "Proof of Claim Form in Bankruptcy". These forms can be obtained from almost any legal supply company. See also source of supply under Local Rule 37(a), comment. The Bankruptcy Act has been amended dispensing with the requirement of the claim to be under oath; however, execution of power of attorney should be under oath.

(b) **Where Filed.** All claims should be filed with the referee. Any proof of claim received by the clerk shall immediately be forwarded to the referee for filing where all claims shall be kept as provided by General Order No. 24.

(c) **Time for Filing.** Claims must be filed within six months after the first date set for the first meeting of creditors.

Comment: See Section 57 of the Bankruptcy Act in regard to filing claims. A claim must be filed in bankruptcy in order to participate in any dividend. A prior filing in a state receivership or other insolvency proceeding does not constitute a filing in the bankruptcy court.

Rule 47.

SOLICITATION OF PROXIES AND VOTING

(a) **Requirements for Voting by Attorneys at Law.** An attorney desir-

ing to vote more than one claim under power of attorney or proxy at any meeting of creditors may be required by the referee in his discretion to furnish information prior to such voting to include:

- (1) The names and amounts of the claims he desires to vote.
- (2) Whether any of the creditors' claims he desires to vote are his regular clients, and if so, their names and the approximate length of time they have been such regular clients.
- (3) The name of the person from whom he received the claims of creditors who are not his regular clients and the nature of his connection with such person or association or company.
- (4) Whether the claims of creditors other than his regular clients have been solicited and if so by whom.
- (5) Whether the said claims will be voted in an interest other than that of general creditors.

(b) Inquiry by Referee as to Solicitation of Proxies. The referee at his own instance or at the request of any party in interest in the proceeding may make or permit inquiry to be made as to the solicitation of claims voted or to be voted. If upon such inquiry it appears that any claims, powers of attorney, or proxies have been solicited with the intent or purpose of voting them at any meeting or hearing in the interest of the bankrupt or in the interest other than that of general creditors, the referee shall allow the voting of such claims under such powers of attorney or proxies. If, in the opinion of the referee, the election of the trustee or the determination of any other matter to be submitted is likely to be unfairly affected by such disallowance, the referee may adjourn the meeting and notify the creditors who executed such powers of attorney or proxies of the adjourned date of the meeting to afford them an opportunity to attend and vote or to execute new powers of attorney or proxies.

Rule 48.

APPEALS FROM REFEREE

(a) Petition for Review. Any person aggrieved by an order of the referee may, within 10 days after the entry of such order or within such extended time as a referee upon petition filed within such 10 day period may for cause shown, file with the referee a petition for review of such order by the court, as provided by Section 39 c of the Bankruptcy Act.

(b) Service of Petition and Brief. A copy of the petition, together with a copy of the brief as hereinafter mentioned shall be served upon the adverse parties who were represented at the hearing by mailing copies of the same to the said parties, such service being indicated by a statement filed with the petition for review. The petition for review shall set forth the order complained of and the alleged errors in respect to such order.

Comment: An unofficial form for petitions for review may be found in Collier on Bankruptcy and Remington on Bankruptcy. See Unofficial Form No. 1000 at Page 3861, Vol. 5, Collier on Bankruptcy, and Unofficial Form No. 3500 at Page 810 in the volume on Forms, Remington on Bankruptcy. There are valuable comments and suggestions under each of the forms cited. There is a \$10.00 filing fee for each petition for review as referred to in Local Rule 36(d) (2).

(c) Briefs. Every petition for review should be accompanied by a brief in support of the alleged errors and the person filing said brief shall serve a copy thereof on the adverse parties who were represented at the hearing. Within 10 days after the referee files with the clerk his certificate for review, the opposing party shall file with the clerk and serve upon the petitioner his answering brief. Briefs should comply with the requirement as set forth in Local Rule 6.

(d) Hearing on Petitions for Review. The referee shall furnish the clerk

of court the name and address of each attorney for the interested parties having appeared in the hearing before him simultaneously with the transferral of the certificate of the referee to the court on the petition for review. Each attorney for the interested parties shall be notified by the referee of the forwarding of the certificate of review to the clerk's office. The clerk upon receipt of the certificate and the names of the attorneys for the interested parties shall immediately make arrangements or cause to be set a hearing on the said petition for review and notify each interested party through his attorney of the date and hour of said hearing. No further notice shall be required of the hearing on the petition for review.

Rule 49.

DEPOSITORIES

(a) Place of Deposit. Receivers and trustees shall deposit all bankruptcy funds in the banks within the district as shall be designated as such depositories, and as directed from time to time, and all funds shall be disbursed by check and countersigned by the referee.

(b) Canceled Checks and Statements. Each depository as designated shall retain the canceled checks and statements and deliver the same to the referee as and when directed. No canceled checks will be delivered by the bank to the trustee. However, the trustee may obtain any information about this account from the bank from time to time.

(c) Monthly Report by Bank. Each depository having funds on bankrupt cases will report to the referee and to the clerk of court by not later than the tenth of each month the name and the amount of each bankruptcy case on deposit in the respective bank as of the last day of the preceding month. The acceptance of the account by the depository is an implied agreement to abide by and be subject to these rules in regard to deposits.

Appendix of Forms

FORM 1

(See Local Rule 22)

Check List and Suggested Form of Order on Final Pre-Trial Conference

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
..... DIVISION

Plaintiff(s)	}	Civil Action No.
vs.		
Defendant(s)		

ORDER ON FINAL PRE-TRIAL CONFERENCE

Pursuant to the provisions of Rule 16 of the Federal Rules of Civil Procedure, and Local Rule 22, a final pre-trial conference was held in the above-entitled cause on the day of, 196.. .., Esquire, appeared as counsel for the plaintiff(s); .., Esquire, appeared as counsel for the defendant(s).

(1) It is stipulated that all parties are properly before the Court, and that the Court has jurisdiction of the parties and of the subject matter.

Note: If the facts are otherwise they should be accurately stated.

(2) It is stipulated that all parties have been correctly designated, and there is no question as to misjoinder or nonjoinder of parties.

Note: If the facts are otherwise, they should be accurately stated.

(3) If any of the parties are appearing in a representative capacity, it should be set out whether there is any question concerning the validity of the appointment of the representatives. Letters or orders of appointment should be included as exhibits.

(4) In general, the plaintiff(s) claims (claim):

Note: Here set out a brief statement of the contentions of plaintiff(s) as to the basis of recovery.*

(5) In general, the defendant(s) claims (claim):

Note: Here set out a brief statement of how the defendant(s) expects (expect) to defeat recovery, and basis for any asserted counterclaim.*

(6) Any third-party defendant(s) or cross-claimant(s) should follow the same procedure as set out in paragraphs (4) and (5) for plaintiff(s) and defendant(s).*

(7) In addition to the other stipulations contained herein, the parties hereto stipulate and agree with respect to the following undisputed facts:

(a)

(b)

Note: Here set out all facts not in genuine dispute.*

*IN CONTRACT CASES, the parties should stipulate upon, or state their contentions with respect to, where applicable (a) whether the contract relied on was oral or in writing; (b) the date thereof and the parties thereto; (c) the substance of the contract, if oral, (d) the terms of the contract which are relied upon and the portions in controversy; (e) any collateral oral agreement if claimed, and the terms thereof; (f) any specific breach of contract claimed; (g) any misrepresentation of fact claimed; (h) if modification of the contract or waiver of covenant is claimed, what modification or waiver, and how accomplished, and (i) an itemized statement of dam-

(8) The following is a list of all known exhibits the plaintiff(s) may offer at the trial:

- (a)
- (b)

Note: Here list the pre-trial identification and a brief description of each exhibit.

(9) It is stipulated and agreed that opposing counsel has been furnished a copy of each exhibit identified by the plaintiff(s), except:

Note: Here set out stipulations with respect to (a) the exhibits that have been furnished opposing counsel, (b) the arrangements made for the inspection of exhibits of the character which prohibits or makes impractical their reproduction, and (c) any waiver of the requirement to furnish opposing counsel with a copy of exhibits.

(10) It is stipulated and agreed that each of the exhibits identified by the plaintiff(s) is genuine and, if relevant and material, may be received in evidence without further identification or proof, except:

Note: Here set out with particularity the basis of objection to specific exhibits. It is permissible to generally reserve the right to object at the trial on grounds of relevancy and materiality.

(11) The following is a list of all known exhibits the defendant(s) may offer at the trial:

- (a)
- (b)

Note: Here list the pre-trial identification and a brief description of each exhibit.

(12) It is stipulated and agreed that opposing counsel has been furnished a copy of each exhibit identified by the defendant(s), except:

Note: Here set out stipulations with respect to (a) the exhibits that have been furnished opposing counsel, (b) the arrangements made for the inspection of exhibits of the character which prohibits or makes impractical their reproduction, and (c) any waiver of the requirement to furnish opposing counsel with a copy of exhibits.

(13) It is stipulated and agreed that each of the exhibits identified by the

ages claimed to have resulted from any alleged breach, the source of such information, how computed, and any books or records available to sustain such damage claimed.

IN NEGLIGENCE CASES, the parties should stipulate upon, or state their contentions with respect to, where applicable (a) the owner, type and make of each vehicle involved; (b) the agency of each driver; (c) the place and time of accident, conditions of weather, and whether daylight or dark; (d) nature of terrain as to level, uphill or downhill; (e) traffic signs, signals and controls, if any, and by what authority placed; (f) any claimed obstruction of view; (g) presence of other vehicles, where significant; (h) a detailed list of acts of negligence or contributory negligence claimed; (i) specific statutes, ordinances, rules, or regulations alleged to have been violated, and upon which each of the parties will rely at the trial to establish negligence or contributory negligence; (j) a detailed list of nonpermanent personal injuries claimed, including the nature and extent thereof; (k) a detailed list of permanent personal injuries claimed, including the nature and extent thereof; (l) the age of any party alleged to have been injured; (m) the life and work expectancy of any party seeking to recover for permanent injury; (n) an itemized statement of all special damages, such as medical, hospital, nursing, etc., with the amount and to whom paid; (o) if loss of earnings is claimed, the amount, manner of computation and period for which loss is claimed; (p) a detailed list of any property damages, and (q) in death cases the decedent's date of birth, marital status, employment for five years before date of death, work expectancy, reasonable probability of promotion, rate of earnings for five years before date of death, life expectancy under mortuary table, and general physical condition immediately prior to date of death.

IN THE EVENT THIS CASE DOES NOT FALL WITHIN ANY OF THE CATEGORIES ENUMERATED ABOVE, OR ANY OF THE CATEGORIES SUGGESTED BY THIS FORM, COUNSEL SHALL, NEVERTHELESS SET FORTH THEIR POSITIONS WITH AS MUCH DETAIL AS POSSIBLE.

defendant(s) is genuine and, if relevant and material, may be received in evidence without further identification or proof, except:

Note: Here set out with particularity the basis of objection to specific exhibits. It is permissible to generally reserve the right to object at the trial on grounds of relevancy and materiality.

(14) Any third-party defendant(s) and cross-claimant(s) should follow the same procedure with respect to exhibits as required of plaintiff(s) and defendant(s).

Note: Attention is called to the provisions of the pre-trial rule with respect to the obligation to immediately notify opposing counsel if additional exhibits are discovered after the preparation of this order.

(15) The following is a list of the names and addresses of all known witnesses the plaintiff(s) may offer at the trial, together with a brief statement of what counsel proposes to establish by the testimony of each witness:

- (a)
- (b)

Note: It is only necessary to state each material point counsel expects to establish by each witness.

(16) The following is a list of the names and addresses of all known witnesses the defendant(s) may offer at the trial, together with a brief statement of what counsel proposes to establish by the testimony of each witness:

- (a)
- (b)

Note: It is only necessary to state each material point counsel expects to establish by each witness.

(17) Any third-party defendant(s) and cross-claimant(s) should follow the same procedure with respect to witnesses as above outlined for plaintiff(s) and defendant(s).

Note: Attention is called to the provisions of the pre-trial rule with respect to the obligation of counsel to produce witnesses, and the obligation to immediately notify opposing counsel if the names of additional witnesses are discovered after the preparation of this order.

(18) There are no pending or impending motions, and neither party desires further amendments to the pleadings, except:

Note: Here state facts regarding pending or impending motion. If any motions are contemplated, such as motion for the physical examination of a party, motion to take the deposition of a witness for use as evidence, etc., such motions should be filed in advance of the final pre-trial conference so that they may be ruled upon, and the rulings stated in the final pre-trial order. The same procedure should be followed with respect to any desired amendments to pleadings.

(19) Additional consideration has been given to a separation of the triable issues, and counsel for all parties are of the opinion that a separation of issues in this particular case would (would not) be feasible.

Note: The position of the parties concerning a separation of the issues should be stated. If there is an agreement with respect to separation of triable issues, the stipulation in regard thereto should be inserted in this final pre-trial order. For an excellent discussion of the advantages to be gained in separating the issues in certain types of cases, see *O'Donnell v. Watson Bros. Transportation Company*, 183 F. Supp. 577 (N.D. Ill., 1960). Also see Rule 42(b), Federal Rules of Civil Procedure.

(20) The plaintiff(s) contends (contend) that the contested issues to be tried by the Court (jury) are as follows:

(21) The defendant(s) contends (contend) that the contested issues to be tried by the Court (jury) are as follows:

(22) Any third-party defendant(s) and cross-claimant(s) contends (contend) that the contested issues to be tried by the Court (jury) are as follows:

Note: In all instances possible, the parties should agree upon the triable issues and include them in this order in the form of a stipulation, in lieu of the three preceding paragraphs.

(23) Counsel for the parties announced that all witnesses are available and the case is in all respects ready for trial. The probable length of the trial is estimated to be days.

(24) Counsel for the parties represent to the court that, in advance of the preparation of this order, there was a full and frank discussion of settlement possibilities, as required by Local Rule 22(k), and that prospects for settlement appear to be (excellent) (good) (fair) (poor) (remote). Counsel for the plaintiff will immediately notify the clerk in the event of material change in settlement prospects.

Note: The attention of counsel is specifically called to the provisions of Local Rule 22(k) requiring a frank discussion concerning settlement possibilities at the time of the conference of attorneys referred to in Local Rule 22(j), and the requirement that, if necessary, clients either be consulted in advance of the conference concerning settlement figures or be available for consultation at the time of the conference. The court will make inquiry at the time of the final pre-trial conference as to whether this requirement was strictly observed.

.....
Counsel for Plaintiff(s)

.....
Counsel for Defendant(s)

Approved and Ordered Filed.

Date:

.....
United States District Judge

As indicated, the above form is intended as a combination check list and suggested form of final pre-trial order. There will always be variations, depending upon the nature of the case and the issues involved. The parties are expected, in good faith, to agree upon, or state their contentions with respect to, all items suggested in this form, if applicable, and other similar matters, that might tend to expedite the trial. The final pre-trial order should be typed in final form and signed in advance of the pre-trial conference.

OTHER MATTERS OCCURRING AT THE FINAL PRE-TRIAL CONFERENCE, E.G., RULINGS ON MOTIONS, REQUIREMENTS WITH RESPECT TO REQUEST FOR JURY INSTRUCTIONS AND THE SUBMISSION OF BRIEFS, A FORMULATION OF THE TRIABLE ISSUES, IF IN DISPUTE, ETC., WILL BE INCORPORATED IN A MEMORANDUM DICTATED BY THE COURT AT THE CONCLUSION OF THE CONFERENCE.

SPECIFIC ATTENTION IS CALLED TO THE PROVISIONS OF LOCAL RULE 22(j) WHICH REQUIRES COUNSEL FOR EACH OF THE PARTIES WHO WILL PARTICIPATE IN THE TRIAL TO MEET AND CONFER AT LEAST FIFTEEN DAYS PRIOR TO THE FINAL PRE-TRIAL CONFERENCE FOR THE PURPOSE OF PREPARING A FINAL PRE-TRIAL ORDER, AND THE PROVISIONS OF LOCAL RULE 22(1) WHICH REQUIRES A COPY OF THE PROPOSED FINAL PRE-TRIAL ORDER TO BE FURNISHED ALL OPPOSING COUNSEL AT LEAST FIVE DAYS IN ADVANCE OF THE FINAL PRE-TRIAL CONFERENCE. THESE TIME PROVISIONS ARE CONSIDERED TO BE EXTREMELY IMPORTANT, AND A FAILURE TO OBSERVE THEM MAY RESULT IN IMPOSITION OF APPROPRIATE SANCTIONS. THE PRE-TRIAL RULE SHOULD BE CAREFULLY EXAMINED BEFORE AN ATTEMPT IS MADE TO PREPARE THIS ORDER.

FORM 2

(See Local Rule 39)

Official Caption and Verification

IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA

In Bankruptcy No.

In the Matter of
..... } PETITION
Bankrupt

To the Honorable, Referee in Bankruptcy:

(CONTENTS OF PETITION)

.....
Petitioner

.....
Attorney for Petitioner
(As to requirement of verification see Local Rule 39(b))

STATE OF
COUNTY OF

I,, the Petitioner named in the foregoing petition,
do hereby make solemn oath that the statements contained therein are true ac-
cording to the best of my knowledge, information and belief.

.....
Petitioner

Sworn to and subscribed before me this the day of, 196...

.....
Notary Public (or other official)
My commission expires

FORM 3

(See Local Rule 38(b))

Division of Attorneys' Fees, Affidavit

(Caption as in Form No. 2)

....., being duly sworn deposes and says:
That he is a petitioner in the above bankruptcy proceeding for compensation
as; that no agreement has been made
directly or indirectly by him, and no understanding exists between him and any
other person for a division of compensation except as follows:;
and that no division of fees prohibited in Section 62 c of the Bankruptcy Act will
be made by the applicant.

.....
Applicant

(Verification)
See Form No 2

FORM 4

(See Local Rule 41)

Specification of Objections to Discharge

(Caption as in Form No. 2)

....., of in the County of,
State of, the trustee of the estate (or a
creditor) of the above named bankrupt (or the United States attorney for said
district or the attorney designated by the Attorney General of the United States),
having examined into the acts and conduct of said bankrupt and being satisfied
that probable grounds exist for the denial of the discharge of said bankrupt and
that the public interest so warrants, does hereby oppose the granting to said
bankrupt of a discharge from his debts, and specifies the following as grounds
of objection: (Here specify in separately numbered paragraphs the grounds of
objection).

.....
Trustee (or creditor, etc.)

(Verification)
See Form No. 2

Rules of Court
of the
United States District Court
for the
Eastern District of North Carolina

Effective January 1, 1962

As Amended Through October 30, 1967

COUNTIES IN THE DISTRICT

Beaufort	Cumberland	Halifax	New Hanover	Sampson
Bertie	Currituck	Harnett	Northampton	Tyrrell
Bladen	Dare	Hertford	Onslow	Vance
Brunswick	Duplin	Hyde	Pamlico	Wake
Camden	Edgecombe	Johnston	Pasquotank	Warren
Carteret	Franklin	Jones	Pender	Washington
Chowan	Gates	Lenoir	Perquimans	Wayne
Columbus	Granville	Martin	Pitt	Wilson
Craven	Greene	Nash	Robeson	

STATUTORY PLACES OF HOLDING COURT

Clinton	Elizabeth City	Washington
	Fayetteville	Wilmington
	New Bern	Wilson
	Raleigh	

UNITED STATES DISTRICT JUDGES

ALGERNON L. BUTLER, <i>Chief Judge</i>	Clinton, North Carolina
JOHN D. LARKINS, JR.	Trenton, North Carolina
CLERK, UNITED STATES DISTRICT COURT	
SAMUEL A. HOWARD	United States Post Office and Courthouse Fayetteville Street Raleigh, North Carolina Telephone: 828-8254

REFEREE IN BANKRUPTCY

THOMAS M. MOORE	309 West Green Bank Building Wilson, North Carolina Telephone: 237-0158
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UNITED STATES PROBATION OFFICE

KIRKWOOD L. HANRAHAN, <i>Chief Probation Officer</i>	United State Post Office and Courthouse Fayetteville Street Raleigh, North Carolina Telephone: TE 4-6429
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**In the United States District Court for the Eastern
District of North Carolina**

IN THE MATTER OF } ORDER
RULES OF PRACTICE IN THIS COURT }

Pursuant to the authority of Section 2071 of Title 28 of the United States Code; Rule 83, Federal Rules of Civil Procedure; Rule 57, Federal Rules of Criminal Procedure; Rule 44, Rules of Practice in Admiralty and Maritime Cases; and Order 56, General Orders in Bankruptcy; and for good cause appearing therefor,

IT IS HEREBY ORDERED THAT:

(a) The General Rules, the Civil Rules, the Criminal Rules, the Rules in Bankruptcy, Rules for Naturalization, and Admiralty Rules attached hereto are hereby approved and adopted to govern the applicable practice in this court.

(b) These rules shall supersede all rules or orders heretofore adopted pertaining to practice before this court.

(c) The effective date of these rules shall be the 1st day of January, 1962, and they shall govern all proceedings thereafter commenced and so far as just and practicable all proceedings then pending; except that, for purposes of Civil Rule 7, Pre-Trial, a case previously at issue shall be deemed to have reached issue on the effective date of these rules. Unless otherwise ordered by the court, cases already pre-tried shall not be subject to Rule 7.

(d) When, by legislative enactment or by judicial rule or order, it is apparent that a conflict exists, these rules shall be considered automatically changed so as to conform to these higher authorities.

(e) The clerk shall arrange for the printing and distribution of these rules and any amendments made subsequent to their adoption. In addition to the distribution required by the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure and General Orders of Bankruptcy, the clerk shall furnish two copies of these rules to each law school in the State of North Carolina, and shall make copies of the rules available to the members of the bar and the public under the directions of the court.

(f) This order shall be entered on the records of this court and a copy of said rules filed in the office of the clerk in each of the divisions of the United States District Court for the Eastern District of North Carolina.

Dated: September 11, 1961.

ALGERNON L. BUTLER
United States District Judge

Preface

The court heretofore appointed a committee of distinguished lawyers of this district to make a study and to recommend local rules of practice for the Eastern District of North Carolina. The committee is composed of Francis E. Winslow of Rocky Mount, Chairman, John H. Hall of Elizabeth City, John C. Rodman of Washington, Claud R. Wheatly, Jr. of Beaufort, George Rountree, Jr. and Alan A. Marshall of Wilmington, Ozmer L. Henry of Lumberton, James R. Nance of Fayetteville, W. T. Joyner and John H. Anderson, Jr. of Raleigh, and Charles P. Green of Louisburg. The court acknowledges with grateful appreciation the careful work of the committee in compiling modern rules of court adapted to the local needs of this district. Appreciation is also expressed to the United States Attorney and the Referee in Bankruptcy who acted in an advisory capacity, and to the Clerk of Court who served as an advisor and as secretary to the committee.

In order to promote uniformity of practice within the State, the rules of the Middle District of North Carolina have been recommended for adoption, with certain modifications to conform to local preferences. The Admiralty Rules of this district which were adopted in February, 1956, have been recommended without change.

These rules embody modern techniques for improving and expediting the operation of the courts and the administration of justice, and represent a substantial improvement in procedural reform in this district. However, rules of court must inevitably change if they are to keep pace with our social, economic, and political development. Therefore, I have requested the same committee that has labored so well in the formulation of these rules to serve as a standing committee for a term of two years to solicit the cooperation of the bench and bar of this district in a continuous study for the purpose of recommending new rules or amendments of the rules, whenever desirable. All lawyers and laymen are urged to participate in the rulemaking work and to bring to the attention of the committee suggestions for improvements. Proposed changes and comments relating to the rules should be directed to The Committee on Rules of Court, United States District Court, United States Post Office and Courthouse, Raleigh, North Carolina.

ALGERNON L. BUTLER
United States District Judge

Clinton, North Carolina
September 11, 1961.

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- | RULE | RULE |
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I. General Rules

[Cite as follows:

Gen. Rule, U.S. Dist. Ct., E.D.N.C.]

Rule 1. Attorneys.

A. Roll of Attorneys. The bar of this court consists of those heretofore and those hereafter admitted to practice before this court who have taken the oath prescribed by the rules in force when they were admitted or the oath prescribed by this rule.

B. Eligibility. Any person who is a member in good standing of the bar of the the Supreme Court of North Carolina, and is a resident of the State of North Carolina, and maintains an office in the State of North Carolina, is eligible for admission to the bar of this court.

C. Special Admission. Any person who is a member in good standing of the bar of the Supreme Court of the United States, or a member in good standing of the bar of the highest appellate court of any state in the United States, may be permitted to appear in a particular case in this court as hereinafter provided.

D. Procedure for Admission. Every person making application for admission to practice in this court shall, prior to being presented in open court for taking the required oath or affirmation, file a written application certified to by two attorneys who are members in good standing of the bar of this court, stating that the applicant is of good moral character and professional reputation and that he meets the requirements of these rules for admission to the bar of this court.

No person shall be admitted to practice in this court as an attorney except on oral motion in open court by a member of the bar of this court. If required, the applicant shall offer satisfactory evidence of his moral and professional character. After the motion for admission has been granted, the applicant shall take the following oath or affirmation:

I do solemnly swear that, to the best of my knowledge and ability, I will support and defend the Constitution of the United States against all enemies, foreign and domestic, and that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will demean myself as an attorney of this court, uprightly and according to law. So help me God.

The fee for admission to the bar of this court shall be \$2.00 and shall be paid to the clerk after the oath is administered to the applicant.

E. Attorneys Who Do Not Maintain an Office in This State and Parties Appearing Pro Se. Except attorneys representing governmental agencies or parties appearing *pro se*, any attorney who has not been admitted to practice in this court, and who does not maintain an office in this state for the regular transaction of business, shall, in each proceeding in which he appears, including the filing of any papers or pleadings, have associate counsel who is a member of the bar of this court and who resides in and maintains an office in this State. The appearance and office address of such associate counsel shall be entered of record, and all notices, rules, and pleadings may be served upon such associate counsel in accordance with the Federal Rules of Civil Procedure or the Federal Rules of Criminal Procedure and with the rules and practice of this court. The attendance of any such associate counsel upon any motion, hearing, or taking of testimony shall be sufficient appearance for the party or parties whom he so represents.

Any pleading presented for filing by an attorney not admitted to practice in this court and who does not maintain an office in the State of North Carolina for the regular transaction of business shall not be filed by the clerk unless at the time of the presentment of said pleading said attorney causes a member of the bar of this court, with offices located in the State of North Carolina, to enter a written appearance as counsel of record for the party litigant which said attorney represents.

F. Withdrawal of Appearance. In any civil or criminal proceeding, no attorney whose appearance has been entered shall withdraw his appearance or have it stricken from the record, except with leave of the court.

G. Agreements of Attorneys. All agreements of attorneys relating to the business of the court shall be in writing; otherwise, if disputed, they will be considered of no validity.

H. Disbarment and Discipline. Any member of the bar of this court may, for good cause shown, and after an opportunity has been given him to be heard, be disbarred, suspended from practice for a definite time, reprimanded, or subjected to such other discipline as the court may deem proper.

Whenever it is made to appear to the court that any member of this bar has been disbarred or suspended from practice pursuant to action on the part of any other court or the pertinent state agency governing or regulating the practice of attorneys, he shall be deemed temporarily suspended forthwith from practice before this court; and, unless upon notice mailed to him at his last known place of residence he shows good cause to the contrary within ten (10) days, there shall be entered an order of disbarment or of suspension for such time as the court shall fix.

Any person who, before his admission to the bar of this court, or during his disbarment or suspension, exercises in this State, or in any action or proceeding pending in this court, any of the privileges of a member of the bar, or pretends to be entitled to do so, is guilty of contempt of court and subjects himself to appropriate punishment therefor.

I. Courtroom Decorum. Counsel in the courtroom shall conduct and demean themselves with dignity and propriety. When addressing the court, counsel shall

rise unless excused by the court and all statements and communications to the court shall be clearly and audibly made from the counsel table or, if the court is equipped with an attorney's lectern, from a standing position behind the lectern facing the court. Counsel shall not approach the bench unless requested to do so by the court or unless permission is granted upon the request of counsel.

J. Professional and Judicial Ethics. The ethical standards relating to the practice of law in this court shall be the canons of professional ethics of the American Bar Association, now in force, and as hereafter modified or supplemented; and the judicial ethical standards shall be the canons of judicial ethics of the American Bar Association, now in force, and as hereafter modified or supplemented. [A copy of the American Bar Association's "Canons of Professional and Judicial Ethics" is filed in the office of the clerk in each of the divisions of this court.]

Rule 2. Court Schedule and Conduct of Business

A. Headquarters of the District. The headquarters of the clerk of the court for this district shall be in Raleigh.

B. Divisions of the District, Counties Comprising the Divisions, Regular Sessions of Court and Motion Days. There shall be seven divisions of this court. Headquarters of each division and the counties comprising the divisions are as follows:

<i>Name of Division</i>	<i>Headquarters</i>	<i>Counties Comprised</i>	
Elizabeth City Division	Elizabeth City	Camden	Gates
		Chowan	Hertford
		Currituck	Pasquotank
		Dare	Perquimans
		Cumberland	Sampson
Fayetteville Division	Fayetteville	Robeson	
New Bern Division	New Bern	Carteret	Lenoir
		Craven	Onslow
		Jones	Pamlico
Raleigh Division	Raleigh	Franklin	Vance
		Granville	Wake
		Harnett	Warren
		Johnston	
		Beaufort	Martin
Washington Division	Washington	Bertie	Pitt
		Greene	Tyrrell
		Hyde	Washington
		Bladen	Duplin
		Brunswick	New Hanover
Wilmington Division	Wilmington	Columbus	Pender
		Edgecombe	Northampton
		Halifax	Wayne
Wilson Division	Wilson	Nash	Wilson

Sessions of court and motion days shall be determined by the court and orders designating the sessions as to divisions shall hereafter issue.

C. Court in Continuous Session. The court shall be in continuous session in all divisions of the district on all business days throughout the year, and all matters of either a criminal or civil nature not reached at the regular sessions of court are deemed to be in an open status and subject to being called for disposition before the next regular session of court upon reasonable notice to the interested parties.

D. Place of Holding Court. Regular or special sessions of court, motion days, pre-trial conferences and other court business will be conducted in the courtroom in the division headquarters building unless otherwise directed. On opening day of a session, court shall commence at 10:00 A.M.; on all other days, unless the presiding judge shall otherwise direct, court shall begin at 9:30 A.M.

E. Order of Business, Regular Sessions of Court. At the regular sessions of court, criminal cases shall be given priority as far as practicable. Civil cases shall be considered next and they will be followed by the consideration of miscellaneous matters brought to the attention of the court.

F. Jury Panels. Separate jury boxes shall be maintained for each division, and the clerk of this court and the jury commissioner shall from time to time, as need may appear, and as by law provided, place in the jury boxes of the several divisions names of suitable and qualified persons to be selected in each instance from the respective divisions and in such number as to the clerk and the jury commissioner may appear proper.

Rule 3. Sureties

A. Nature of Security. In both civil and criminal actions, except as otherwise provided by law, every recognizance, stipulation, bond, guaranty, or undertaking, hereinafter called "penal bonds", must be secured by the deposit of cash or negotiable government bonds equal at their par value to the amount of such penal bond; and, in both civil and criminal actions, penal bonds shall be allowed and taken with security, or one or more sureties, as provided by the federal statutes, the Federal Rules of Civil Procedure, and the Federal Rules of Criminal Procedure. However, it shall be understood that any judge of this district may, in his discretion, from time to time, enter pertinent orders restricting any bonding company or surety company from being accepted as surety upon any bond in any case or matter in this district.

B. Prohibited Sureties. Members of the bar, administrative officers and employees of this court, the United States Marshal, his deputies and assistants, shall not act as surety in any suit, action or proceeding pending in this court.

Rule 4. Motions Filed Prior to Trial

A. Motions To Be Written. All motions, including objections to interrogatories or objections to requests for admission, filed prior to trial, must be written.

B. Service by Movant and Respondent. The movant and respondent shall serve copies of their respective papers upon opposing party or his counsel when such papers are filed with the clerk.

C. Documents Substantiating Motion. When allegations of fact are relied upon in support of a motion, all pertinent affidavits, transcripts of depositions, and other documents must accompany the motion whenever practicable. In any event, such supporting documents must be filed within 10 days after the motion has been filed, unless otherwise ordered by the court.

D. Briefs Supporting Motions, Submission of. Motions shall be accompanied by a brief or memorandum unless the motion itself discloses the basis upon which the relief sought by the movant should be granted.

E. Order Proposed, Submission of. The movant and the respondent may submit to the court at the time of filing their respective papers a draft of the order which they desire the court to enter and shall do so upon request of the court. The proposed order shall not become a part of the record in the case; provided, an order that has been tendered and modified or refused may thereafter be filed if so directed by the court.

F. Response to Motions. If the respondent to a motion desires to file a response, brief, affidavit or other document in support of his position, he shall file same within 20 days after service of the motion and brief, unless otherwise ordered by the court.

G. Reply Briefs. A brief in reply to matters argued in the respondent's brief may be filed by the movant within 20 days after service of the respondent's brief, unless otherwise ordered by the court.

H. Hearing of Motions. Motions will be considered and decided without a hearing, unless otherwise ordered by the court, or unless requested by counsel for either movant or respondent. Uncontested motions will not be denied without giving the movant an opportunity to be heard.

I. Failure to File and Serve Papers. Failure of a party to file and serve his papers within the time herein specified, unless the time therefor has previously been otherwise fixed by order of the court, will be noted by the court and may constitute a waiver of the right to thereafter file such papers, unless good cause for the failure is shown.

J. Notice of Hearing. Hearing of motions shall be had on such notice as is provided by the Federal Rules of Civil Procedure.

K. Conference With Respect to Motions and Objections Relating to Discovery. With respect to all motions and objections relating to discovery pursuant to Rules 26 through 37, Federal Rules of Civil Procedure, counsel for each of the parties shall meet and confer in advance of the hearing in a good faith effort to narrow the areas of disagreement. It shall be the responsibility of counsel for the movant to arrange for the conference.

Rule 5. Briefs or Memorandums

A. Service. Every brief or memorandum required by these rules or an order of the court shall be served upon opposing parties or their counsel when same is presented to the court, or to the clerk for the use of the court, and a certificate shall be filed with the clerk indicating the time and method of service. Briefs and memorandums shall not become a part of the record in the case.

B. Contents of Brief. All briefs filed with the court shall contain, wherever applicable to the point involved:

1. A statement of the nature of the matter before the court.
2. A statement of the question or questions involved.
3. The argument, including a reference to and a discussion of the application of statutes, rules, and authorities relied upon.

C. Citation of Cases. Cases cited should include parallel citations, the year of the decision, and the court deciding the case. The following are illustrations of this rule:

1. State Court citation: *Rawls v. Smith*, 238 N. C. 162, 77 S.E. 2d 701 (1953).
2. District Court citation: *Smith v. Jones*, 141 F. Supp. 248 (E.D.S.C. 1956).
3. Court of Appeals citation: *Smith v. Jones*, 237 F.2d 597 (4th Cir., 1956).
4. United States Supreme Court citation: *Smith v. Jones*, 325 U. S. 196, 65 S.Ct. 1120, 89 L.Ed. 1554 (1954).
5. If a petition for certiorari was filed in the United States Supreme Court, disposition of the case in the Supreme Court should always be shown with parallel citations. For example:
Carson v. Warlick, 238 F.2d 724 (4th Cir., 1956), certiorari denied 353 U. S. 910, 77 S.Ct. 665, 1 L.Ed.2d 664 (1957).

Rule 6. Examination of Jurors

A. Rules 47, F. R. Civ. P. and 24(a), F. R. Cr. P. Apply. The examination of prospective jurors shall be made as provided in Rule 47 of the Federal Rules of Civil Procedure, and Rule 24(a) of the Federal Rules of Criminal Procedure.

B. Jury Lists. When the jury for a session of court is drawn, members of the bar of this court shall be permitted to have a copy of the list. The list shall set out the name and address of each juror. But the jurors shall not be contacted, either directly or through any member of the immediate family of any juror, in

an effort to secure information concerning the background of any member of the jury panel.

When the jurors report for duty at a session of court, the clerk shall make available to members of the bar of this court a jury list which sets forth the name, address, and occupation of each juror as shown by the records of the court; and when seated in the jury box a chart, or list, will be furnished by the clerk to the parties, or their counsel, upon request, revealing the name and seating assignment of each juror.

Rule 7. Opening Statements

A. Civil Actions. When the trial of a civil action is begun, after the jury has been empaneled in cases to be tried by a jury, the party on whom rests the burden of proof shall succinctly state, without argument, his cause of action and basic contentions. The adverse party may then, without argument, succinctly state his defense and cross-action or counterclaim, if any, and basic contentions. Pleadings shall not be read in any cause unless otherwise directed by the court.

B. Criminal Actions. In the trial of criminal cases, the government may make opening statements with reference to its theory of the case, and the manner in which it expects to offer proof; such opening statements by the government must be made after plea or arraignment and before the introduction of evidence by the government. The defendant, through his attorney, may make an opening statement immediately following the opening statement by the government, or immediately preceding the offering of evidence by the defendant.

Rule 8. Argument

In all cases, both civil and criminal, the right to open and close the argument shall belong to the party who has the burden of proof, except that in cases where the defendant offers no evidence, such defendant shall have the right to close the argument; provided, however, the court in its discretion can otherwise determine the order of argument.

Rule 9. Instructions

In all cases tried by a jury, the points on which either party desires the jury to be instructed must be in writing and furnished to the court before the argument to the jury commences, subject to the provisions of Rule 51 of the Federal Rules of Civil Procedure.

Rule 10. Designation of Contents of Record on Appeal

A. Time for Filing Designation. Unless the parties file a written stipulation with the clerk within 20 days after notice of appeal is filed designating the papers which shall constitute the record on appeal, the clerk shall certify and forward to the Court of Appeals all the original papers in the case file dealing with the action or proceeding in which the appeal is taken.

B. Notice by Clerk. When notice of appeal is filed, the clerk shall notify the parties of the provisions of this rule.

C. Record on Appeal. The attention of the clerk and the bar is directed to the United States Court of Appeals, Fourth Circuit, rule relating to records on appeal from district courts. (U.S.Ct. of App.4th Cir. Rule 9, 28 U.S.C.A.)

D. Clerk's Fees in Cases on Appeal. The clerk of this court shall charge and collect \$5.00 for filing each Notice of Appeal, and in addition thereto, for making a copy (except a photographic reproduction) of any record or paper, and the certification thereof 65 cents per page; for comparing with the original thereof any copy (except a photographic reproduction) of any transcript of record, entry, record, or paper, when such copy is furnished by the person requesting its certification, 10 cents for each page, and 50 cents for each certificate; and for

a photographic reproduction and certification of any record or paper, 50 cents per page; and for comparing with the original thereof any photographic reproduction of any record or paper not made by or under the supervision of the clerk, 5 cents for each page and 50 cents for each certificate.

Rule 11. Photographing and Reproducing Court Proceedings

The taking of photographs in the courtroom, or court offices or in the corridors immediately adjacent thereto, during the progress of judicial proceedings, or any proceeding ancillary or incident thereto, or during any recess of the court, and the transmitting or sound-recording of such proceedings for broadcasting by radio or television, introduces extraneous influences which tend to have a detrimental psychological effect on the participants and to divert them from the proper objectives of the trial, and shall not be permitted.

Proceedings, other than judicial proceedings, designed and conducted as ceremonies, such as naturalization proceedings, administering oaths of office to appointed officials of the court, presentation of portraits and similar ceremonial occasions, may be photographed in or broadcast from the courtroom, with the permission and under the supervision of the court.

Rule 12. Powers of Clerk

A. Approval of Security. The clerk or deputy clerk is authorized to approve all recognizances, stipulations, bonds, guaranties, or undertakings, in the penal sum prescribed by statute or order of the court, whether the security be property, or personal or corporate surety.

B. Seizure of Person or Property. All acts and duties pertaining to the seizure of person or property as provided by the law of the State of North Carolina, authorized or required to be done by a judge or the clerk of a state court, may be done in like cases by the district judge or the clerk of the district court, as the case may be.

C. Orders and Judgments. Pursuant to the provisions of Rule 77(c), Federal Rules of Civil Procedure, the clerk or the deputy clerk(s) in the division in which the action or proceeding is pending, is/are authorized to grant and enter the following orders and judgments without further direction by the court, but his action may be suspended, altered or rescinded by the court for cause shown:

1. Consent orders for the substitution of attorneys.

2. Consent orders extending for not more than 30 days the time within which to answer or otherwise plead, answer interrogatories submitted under Rule 33, Federal Rules of Civil Procedure, or requests for admission as provided for in Rule 36, Federal Rules of Civil Procedure. Matters in bankruptcy and those matters excluded in Rule 6(b), Federal Rules of Civil Procedure, are not included in this authorization.

3. Consent orders dismissing an action, except in bankruptcy proceedings and in causes to which Rule 23(c) and Rule 66, Federal Rules of Civil Procedure, apply.

4. Orders cancelling liability on bonds.

5. Orders changing the time of opening and adjourning court in the absence of the judge.

6. Judgments by default as provided for in Rule 55(a) and 55(b) (1), Federal Rules of Civil Procedure.

7. Any other motions, rules, orders, or proceedings which are grantable of course or without notice may be received, disposed of, and acted upon at any time by the judge or the clerk, as the case may be or require.

8. Pursuant to the provisions of 28 U.S.C. § 956, the clerk or the deputy clerk(s), when there is need to serve a complaint and attachment upon a vessel, or any other process incident to admiralty and maritime claims, either *in rem* or

in personam, are empowered to grant and enter an order authorizing any sheriff or any deputy sheriff, or other suitable person, to serve all such process.

Consent to an order shall be indicated by the signature of an attorney of record for each of the parties.

D. Other Powers and Duties. The clerk or deputy clerk shall exercise any other powers and perform any other duties assigned to them by the court pursuant to 28 U.S.C. Sec. 956.

Rule 13. Removal of Papers From the Custody of the Clerk

A. Temporary Removal. Papers on file in the office of the clerk shall be produced pursuant to a subpoena from any court directing their production, or in the discretion of the clerk, may be temporarily removed by the United States Attorney, the Referee in Bankruptcy, or for the court. Otherwise, papers may be removed from the files only upon order of the court. Whenever papers are withdrawn, the person receiving them shall leave with the clerk a signed receipt identifying the papers taken.

B. Permanent Removal. Upon a proper showing, the court may permit a paper or a record to be permanently withdrawn.

Rule 14. Custody and Disposition of Models and Exhibits

A. Custody. After being marked for identification, exhibits of a documentary nature offered or admitted in evidence in any cause pending or tried in this court shall be placed in the custody of the clerk unless otherwise ordered by the court. All other exhibits, models, and material offered or admitted in evidence shall be retained in the custody of the attorney or party producing same at trial.

B. Removal. Whenever any models, diagrams, exhibits or material have been placed in the custody of the clerk, said articles shall be removed by the party offering such evidence, except as otherwise directed by the court, within 30 days after final judgment. At the time of removal, a detailed receipt shall be given to the clerk and filed in the case file.

C. Neglect to Remove. If the party offering models, diagrams, exhibits, or materials for evidence which have been placed in the custody of the clerk fails to remove such articles as provided herein, the clerk shall write the attorney of record, or if none, the party offering the evidence, calling attention to the provisions of this rule. If the articles are not removed within 30 days after the mailing of such notice, they may be destroyed by the clerk.

Rule 15. Court Library

A. Use of Books. Attorneys practicing before this court, the United States Attorney or any member of his staff, and other law enforcement officers of the government may borrow the books in the court library for use in the library or courtroom; however, no book may be removed from the courthouse.

B. Receipt for and Return of Books. Books removed from the library shall be receipted for by the borrower. Persons removing books from the library pursuant to this rule shall be responsible for their immediate return.

Rule 16. Procedure in Cases of Contempt of Court

A. Criminal Contempt. In all cases of criminal contempt the procedure prescribed by Rule 42 of the Federal Rules of Criminal Procedure shall be followed.

B. Civil Contempt. In all cases of civil contempt the contemner shall have due notice of the contempt charges against him, opportunity to reply to the charges and notice of the date and place of hearing in open court from which the public shall not be excluded. At the hearing on the contempt charges the contemner

shall have the right to defend himself against the charges and to offer evidence in the form of affidavits, and the movant shall have the right to offer the same sort of evidence in his behalf. In no case of civil contempt shall the parties be entitled to a jury trial, but the district judge before whom the case is tried shall find the facts and enter his judgment or order accordingly.

C. Appeals. Appeals from contempt orders or judgments shall be governed by the applicable Federal Rules of Civil Procedure and Federal Rules of Criminal Procedure relating to appeals.

Rule 17. Procedure in Habeas Corpus and Motions Under 28 U.S.C.A. § 2255

A. Federal Prisoners. Upon the filing by a federal prisoner of an application for a writ of habeas corpus under 28 U.S.C.A. § 2242, or a motion to vacate, set aside or correct sentence under 28 U.S.C.A. § 2255, the clerk shall cause one copy of the application or motion to be served immediately on the United States Attorney, and the United States shall file answer to each claim asserted and shall admit or deny the allegations or contentions upon which the petitioner relies, and shall set forth affirmatively any other reason for denying relief. The United States shall attach to its answer certified copies of the indictment, plea of petitioner, and the judgment, or such of them, and such other records, as may be material to the issues joined.

The original and a copy of the answer and attachments shall be filed with the clerk and a copy served on the petitioner or his counsel within twenty days after the service of the application or motion, unless a shorter time is ordered by the court.

B. State Prisoners. Upon the filing by a state prisoner of an application for a writ of habeas corpus under 28 U.S.C.A. § 2242, the clerk shall cause one copy of the application to be served immediately on the respondent, and the respondent shall file answer to each claim asserted and shall admit or deny the allegations or contentions upon which the petitioner relies, and shall set forth affirmatively any other reason for denying relief. The respondent shall attach to his answer certified copies of the indictment, plea of petitioner, and the judgment, or such of them, and such other records, including the records of any post-conviction proceedings, as may be material to the issues joined.

The original and a copy of the answer and attachments shall be filed with the clerk and a copy served on the petitioner or his counsel within twenty days after service of the application, unless a shorter time is ordered by the court.

Rule 18. Procedure in Applications for Habeas Corpus by Persons in State Custody

A. Applications for writ of habeas corpus by persons in state custody shall be in writing, signed and verified. Such applications shall be on forms supplied by the court.

B. The following information shall be supplied by every petitioner :

1. The name of the petitioner ;
2. The name of the respondent and the name of the institution in which confined ;
3. The place of petitioner's detention ;
4. The name and location of the court which imposed sentence ;
5. The offense(s) for which sentence was imposed ;
6. The date upon which sentence was imposed and the terms of the sentence ;
7. Whether petitioner pleaded guilty, not guilty, or nolo contendere ;
8. If plea was not guilty, whether petitioner had a jury trial ;
9. Whether petitioner appealed to the Supreme Court of North Carolina ; and, if so, the result of such appeal, the date of such result, and (if known) the citation of any written opinion ;

10. If petitioner did not appeal, the reasons why he did not do so;

11. In concise form, the grounds on which petitioner bases his allegation that he is being held in custody in violation of the Constitution and laws of the United States, the facts which support each of these grounds, and whether any such grounds have been previously presented to any court, state or federal, in any proceeding; if so, which grounds have been previously presented and in what proceedings, and which grounds have not been previously presented and the reason why such grounds have not been previously presented;

12. Whether petitioner has filed in any court, state or federal, petitions, applications, or motions with respect to this conviction; if so, the name and location of each such court, the specific nature of the proceedings therein, the grounds alleged in support of each proceeding, the result thereof, the date of such result, and (if known) the citations of any written opinions.

13. Whether petitioner was represented by a lawyer at his arraignment and plea, his trial (if any), his sentencing, his appeal (if any), or preparation or presentation of any post-conviction proceedings which he has filed with respect to this conviction;

14. If petitioner seeks leave to proceed *in forma pauperis*, whether he has completed the affidavit attached to the form.

C. Where an application is *in forma pauperis*, petitioner shall complete the affidavit attached to the form setting forth information which establishes that he is unable to pay the fees and costs of the habeas corpus proceeding or give security therefor.

D. Applicants shall mail an original and two copies of the completed application to the clerk of the District Court for the Eastern District of North Carolina at Raleigh, North Carolina. The clerk will assign the application to the proper judge pursuant to the rules of this court.

II. Civil Rules

[Cite as follows:

Civ. Rule, U. S. Dist. Ct., E.D.N.C.]

Rule 1. Form of Pleadings and Documents

All pleadings and papers submitted for filing or consideration must designate the division in which the action is pending, or to which it is to be removed from a state court, and they must also fully conform to the provisions of Rules 10 and 11, Federal Rules of Civil Procedure. If feasible, each paper presented to the clerk for filing shall be flat and unfolded, without manuscript cover, and firmly bound. All papers so presented for filing shall consist of the original and one copy, in addition to copies for service.

Rule 2. Filing Fee and Security for Costs

A. Initiating Civil Actions. In every civil action commenced in this court, there shall be filed with the complaint:

1. \$15.00 filing fee;
2. \$200.00 bond, approved by the clerk, or cash deposit of \$200.00 in lieu of such bond, as security for costs.

B. Removal of Actions From State Courts. In every action removed:

1. \$15.00 filing fee;
2. \$200.00 removal bond, approved by the clerk, or a cash deposit of \$200.00 in lieu of such bond, as security for costs as required by 28 U.S.C. §1446(d).

Rule 3. Filing of Papers and Service

A. Filing of Papers or Pleadings. The original and a copy of all pleadings, motions, notices of hearing, and other papers shall be filed with the clerk in the

division where the action is instituted, when such clerk is available, otherwise with the clerk in Raleigh unless otherwise specified by general order of the court, and shall be filed either before service on opposing party, or counsel, or immediately thereafter. In all instances in which papers are filed with the judge as provided in Rule 5(e), Federal Rules of Civil Procedure, the original and a copy shall likewise be filed with the judge for retention in the clerk's office in the division in which the action is pending.

B. Service of Papers. Except as set forth below in this rule, it is the responsibility of counsel filing papers to serve one copy on each opposing party or his counsel.

1. *Service in Patent Cases.* In cases involving patent or trade-mark questions, two copies shall be served on each opposing party or his counsel.

2. *Service When the United States is a Party.* In cases in which the United States is a party, in addition to the copies of the summons and complaint required by Rules 4(d) (4) and 4(d) (5), Federal Rules of Civil Procedure, three (3) copies of each pleading or other paper shall be served on the United States Attorney.

C. Proof of Service. Proof of service may be made by written acknowledgment of service by the party served, or by a certificate of counsel for the party filing the pleading or paper, or by affidavit of the person making service, but these methods of proof shall not be exclusive.

D. Ex Parte Orders and Orders to Show Cause. Whenever the court has made an *ex parte* order, the party obtaining it shall serve a copy thereof, and the papers upon which it was based, within three days thereafter upon each adverse party who is affected thereby; however, orders to show cause shall be served within the time limited by the order.

Rule 4. Notification

A. Intervention by United States; Constitutional Question. If at any time prior to the trial of an action to which neither the United States nor any of its officers, agencies, or employees is a party, any party draws in question the constitutionality of an act of Congress affecting the public interest, that party, to enable the court to comply with 28 U.S.C. Sec. 2403, shall notify the court in writing, stating the title of the action, the statute in question, and the respects in which it is claimed the statute is unconstitutional.

B. Three-Judge District Court. Where any action is required by act of Congress to be heard and determined by a district court of three judges, the party instituting such action shall immediately notify the clerk of this requirement in writing, separate and apart from the pleadings.

Rule 5. Minors and Incompetents as Parties

A. Appearance and Appointment of Next Friend. In actions where any of the parties plaintiff are minors or persons *non compos mentis* they shall appear by their qualified general or testamentary guardian, but if such action is against such guardian, or if there is no such guardian, then said parties shall appear by their next friend, who may be appointed as provided for in Rule 17(c), Federal Rules of Civil Procedure.

B. Appearance and Appointment of Guardian Ad Litem. In actions where any of the defendants are minors or persons *non compos mentis* they shall appear by their qualified general or testamentary guardian, or if there is no such guardian, then they shall appear by a guardian *ad litem* who may be appointed as provided for in Rule 17(c), Federal Rules of Civil Procedure.

C. Appointment by State Courts in Removed Actions Recognized. Next friends or guardians *ad litem* appointed by North Carolina state courts in actions subsequently removed to this court may appear for such parties unless otherwise ordered by this court.

D. Settlement or Dismissal of Actions. No action to which a minor or an incompetent person is a party shall be compromised, settled, discontinued, or dismissed without approval by the court.

E. Contents of Judgment Approving Settlement. Judgments approving compromise settlements of claims of minors or incompetents shall be presented to the court upon oral or written motion, and shall be consented to by counsel for all parties to the action, by the next friend or guardian of the plaintiff, and in cases involving a minor, by at least one of the parents of such minor or by the persons standing *in loco parentis*, unless otherwise ordered by the court, and in cases where the minor is over eighteen years of age, by such minor also. In presenting such judgments to the court for approval, counsel shall show, to the satisfaction of the court, as the nature of the action may require, at least the following:

1. That all parties are represented by counsel, that the plaintiff appears as required by this rule, and that the court has jurisdiction over the parties and the subject matter.

2. The basic contentions of the respective parties with respect to liability.

3. A recent written statement of the plaintiff's attending physician, if any, setting forth the nature and extent of the injuries, extent of recovery and prognosis.

4. The amount of medical, hospital, and related expenses incurred, or estimated to be incurred.

5. The services rendered by counsel for the plaintiff.

6. The opinion of plaintiff's counsel as to the fairness and reasonableness of the proposed compromise settlement.

F. Payment of Judgments. Judgments entered under this rule shall be paid as provided by the court.

G. Counsel Fees Subject to Approval of Court. In all actions falling within the purview of this rule, the court shall approve or fix the amount of the fee to be paid to counsel for the plaintiff, and may make appropriate provision for the payment thereof, and for the payment of expenses incurred, including, but not limited to, medical, hospital, and related expenses.

Rule 6. Joining Issues, Extension of Time to Plead

As a means of avoiding congestion of the civil docket in all divisions of the court, issues must be joined in all cases as soon as practicable. Motions to extend the time to answer or otherwise plead for more than 50 days will be denied, except in unusual circumstances.

Rule 7. Pre-Trial

A. Requirement. There shall be a pre-trial conference in every civil case, unless counsel for the parties stipulate in writing to the contrary and the court approves the stipulation.

B. Notice. The clerk shall give at least 20 days notice of the pre-trial conference.

C. Participants. At least one attorney for each of the parties who is a member of the bar of this court shall appear and conduct the pre-trial conference. However, bar membership shall not be required of attorneys representing governmental agencies and parties appearing *pro se*.

D. Use of Discovery Procedures. Attorneys are encouraged to make full use of all discovery procedures provided for in Rules 26 through 37, Federal Rules of Civil Procedure, instead of seeking information or admissions at the conference of attorneys or at the pre-trial conference.

E. Completion of Discovery. In all civil cases, except in patent, anti-trust, and trade-mark cases, all discovery from adverse parties shall be completed

within four months after the case is at issue. In patent, anti-trust, and trade-mark cases, discovery shall be completed within eight months after the case is at issue. For good cause shown, the physical or mental examination of a party, as provided for in Rule 35, Federal Rules of Civil Procedure, may be ordered at any time prior to trial.

F. Extension of Time for Discovery. For good cause shown, and prior to the expiration of the time within which discovery is required to be completed, either under this rule or by order of the court, time may be extended by the court for completion of discovery. Stipulations extending the discovery period must be approved by the court.

G. Conference of Attorneys. At least 10 days prior to the pre-trial conference, attorneys for each of the parties shall meet and confer for the following purposes:

1. *Exhibits.* Except as otherwise herein provided, each attorney shall mark for identification and furnish opposing counsel with a copy of all exhibits which he expects to introduce at the trial. Numbers or marks placed on such exhibits shall be prefixed with the symbol "P/T" denoting its pre-trial designation. When the exhibit is introduced at the trial of the case, the "P/T" designation will be stricken and the exhibit will be identified as a trial exhibit. All pre-trial exhibits must also indicate the party identifying same.

Exhibits of the character which prohibit or make impractical their reproduction shall be identified and notice given of their intended use. Additionally, necessary arrangements must be made to afford opposing counsel an opportunity to examine such exhibits.

2. *Exhibit Stipulations.* Written stipulations shall be prepared with reference to all exhibits exchanged or identified. The stipulations shall contain all agreements of the parties with reference to the exchanged and identified exhibits and shall include, but not be limited to, the agreement of the parties with reference to the authenticity of the exhibits, their admissibility in evidence, and the provisions made for the inspection of identified exhibits. The original and a copy of the exhibit stipulations shall be presented to the court at the pre-trial conference.

3. *Fact Stipulations.* The attorneys shall stipulate in writing with reference to all facts and issues not in genuine dispute. The original and a copy of the stipulations shall be presented to the court at the pre-trial conference.

4. *Exchange of Information.* Attorneys for each of the parties shall furnish opposing counsel with a brief statement in writing of what counsel proposes to establish by the testimony of witnesses.

5. *Discuss Settlement.* The possibility of compromise settlement shall be fully discussed and explored.

H. Preparation for Conference of Attorneys. Each attorney shall completely familiarize himself with all aspects of the case in advance of the conference of attorneys, and be prepared to enter into stipulations with reference to as many facts and issues and exhibits as possible.

1. *Duty of Plaintiff's Counsel to Arrange Conference.* It shall be the duty of counsel for the plaintiff to arrange for the conference of attorneys. In the absence of an agreement to the contrary, the conference shall be held in the office of the attorney nearest the court in the division in which the action is pending.

I. Refusal to Stipulate. It, following the conference of attorneys, either party feels there are other facts or exhibits that should be stipulated, and which opposing counsel refuses to stipulate upon, he shall compile a list of such facts or exhibits and furnish same to opposing counsel at least two days in advance of the pre-trial conference. The original and a copy of the list shall be presented to the court at the time of the pre-trial conference.

K. Information or Exhibits Discovered Subsequent to Conference of Attorneys and Before a Pre-Trial Conference. If, after the conference of the attorneys and before the pre-trial conference, counsel discovers additional exhibits or additional information, the same information required to be disclosed at the conference of the attorneys shall be immediately furnished opposing counsel. The original and a copy of any such disclosures shall be presented to the court at the time of the pre-trial conference.

L. Conduct of the Pre-Trial Conference. At the pre-trial conference, the court, after being fully informed by counsel for each of the parties concerning all facts and issues involved in the case, shall:

1. Urge agreement with respect to any additional facts and exhibits not in genuine dispute, and make findings with respect thereto.

2. Consider and rule upon all motions, including but not limited to, motions to continue, amend, consolidate, or sever.

3. Enter a pre-trial memorandum incorporating (a) any additional stipulations with respect to facts and exhibits, (b) a ruling upon all pending motions, including motions made at the pre-trial conference, (c) the written stipulations as to facts, exhibits, and information as to proposed proof required to be presented to the court before or at the time of the pre-trial conference, (d) the points with respect to which the court desires trial briefs, (e) in appropriate cases, requirements with respect to requests for jury instructions, (f) if practicable, a determination of the issues of fact and questions of law that will govern the trial of the case, and (g) other appropriate matters.

4. Make inquiry concerning the possibility of compromise settlement. The discussion concerning compromise settlement shall not be incorporated in the pre-trial memorandum, and such discussion shall be entirely without prejudice and may not be referred to during the trial of the case or in any arguments or motions. The primary objective of pre-trial procedure shall be to facilitate trial and a just judgment; compromise settlement shall be regarded as a by-product of such procedure rather than the end sought.

5. At the conclusion of the pre-trial conference, if it is possible to do so, the court will fix a definite date for trial.

M. More Than One Pre-Trial Conference. If necessary or advisable, the court may adjourn the pre-trial conference from time to time, or may order an additional pre-trial conference.

N. Information or Exhibits Discovered Subsequent to Pre-Trial Conference. If, following the pre-trial conference, or during trial, counsel discovers additional exhibits or points of proposed proof, the same information required to be disclosed at the conference between attorneys shall be immediately furnished opposing counsel. The original and a copy of any such disclosure shall immediately be filed with the court, and shall indicate the date same was furnished opposing counsel.

O. Continuance of Pre-Trial Conference. A pre-trial conference shall be continued only for cause.

P. Sanctions for Failure to Comply With This Rule. If there is a failure to comply with the provisions of this rule, the court may, in its discretion, impose such penalties and invoke such sanctions as the circumstances may warrant, in accordance with the Federal Rules of Civil Procedure, including the dismissal of the action or the exclusion of evidence. If one of the parties attempts to comply with the provisions of this rule, and he fails to secure the cooperation of opposing counsel, the party attempting to comply shall file with the court, not later than two days in advance of the pre-trial conference, an affidavit disclosing, with particularity, all the circumstances relating to the refusal of opposing counsel to cooperate and comply with the provisions of this rule. A copy of the affidavit shall be served upon opposing counsel before it is filed with the

court, and the affidavit shall disclose the date and method of service. If opposing counsel desires to controvert any of the factual statements contained in the affidavit, he shall immediately serve an affidavit in response and be prepared to file the original thereof with the court at the time of the pre-trial conference. After considering the affidavits and remarks of counsel, the court may impose such penalties and invoke such sanctions as the circumstances might warrant.

Q. Sanctions for Failure to Reveal Exhibits and Points of Proof. A willful failure to reveal exhibits and points of proposed proof as required by this rule may render such exhibits and proof inadmissible at the trial.

R. Expert Witnesses. At the conference of attorneys, counsel for each of the parties shall furnish opposing counsel in writing the names, addresses, and fields of experience of all of their expert witnesses, together with the substance of the evidence expected from each of them. At the pre-trial conference with the judge, he may limit the number of such witnesses for each party and allow any adverse party to call an equal number of expert witnesses, making an appropriate order to insure that all parties are furnished with similar information as to such witnesses a reasonable time before trial. Upon failure to comply with this rule, without good cause shown, the defaulting party shall not be permitted to call an expert witness.

Rule 8. Substance of Depositions To Be Stated

In the trial of all causes before the court without a jury, any deposition, or part of deposition, offered in evidence as provided by Rule 26 of the Federal Rules of Civil Procedure, need not be read, but counsel may state to the court the substance and effect of such depositions, or part thereof relied upon, either orally or from a condensed abstract prepared beforehand.

Rule 9. Issues Submitted to Jury

In all civil cases tried by a jury, the parties shall hand to the court in writing at or before the conclusion of the evidence their requests for issues to be submitted to the jury, if the same have not previously been fixed at the pre-trial conference.

Rule 10. Taking Verdict

In all civil jury cases the court will not deem it necessary to call either party or counsel, nor shall it be necessary that either party be present or represented when the jury returns into court their verdict; and in all cases, unless the contrary affirmatively appears of record, it will be presumed that the parties were present or by their voluntary absence, waived their presence.

Rule 11. Taxing Costs

A. Bond Premiums, Taxable as Costs. If costs are awarded by the court, the reasonable premiums or expense paid on all bonds or stipulations or other security given by the prevailing party shall be taxed as part of the costs.

B. Witness Fees, Subsistence, and Mileage. Executive officers and directors of corporate parties shall not be entitled to witness fees, subsistence, or mileage. In addition to the fees and subsistence authorized by statute for other witnesses, they shall be allowed their actual mileage at the statutory rate to and from their place of residence whether they reside within or without the district.

C. Preparation and Filing of Bill of Costs. The prevailing party shall prepare as soon as possible after entry of the final judgment allowing costs to it a Bill of Costs on the form supplied by the clerk. This Bill of Costs shall contain an itemized schedule of the costs and an affidavit made by said party or his attorney or agent having knowledge of the facts that the schedule is correct and that the charges have been necessarily incurred and that the services for which fees have been charged were actually and necessarily performed. The original of

this Bill of Costs shall thereupon be filed with the clerk and a copy served on counsel for the adverse party.

D. Objections to Bill of Costs and Hearing. The adverse party may make specific objections to any item of costs requested by the prevailing party. The clerk shall set the matter for hearing and thereafter tax the costs.

E. Review of Clerk's Ruling. If either party is dissatisfied with the ruling of the clerk on the Bill of Costs, such action may be reviewed by the court upon motion duly made in writing within five days of the action of the clerk.

Rule 12. Removed Actions

In a civil action removed from the state courts, a party who desires and is entitled to trial by jury under Rule 38, Federal Rules of Civil Procedure, shall be accorded it, if his express demand therefor in writing is served within 10 days after the petition for removal is filed if he is the petitioner, or if he is not the petitioner within 10 days after service on him of the notice of filing the petition. The failure of a party to make demand as required by this rule and to file it promptly with the clerk constitutes a waiver by him of trial by jury.

III. Criminal Rules

[Cite as follows:

Cr. Rule . . . , U. S. Dist. Ct., E.D.N.C.]

Rule 1. Pre-Trial Conference

In protracted criminal cases involving unusual and complicated issues, the court may hold a preliminary conference for the purpose of discussing the possibility of stipulating undisputed facts; however, no pre-trial conference shall be ordered without the consent of the defendant and his attorney freely given, with the provision that the defendant and his attorney must be present during the entire pre-trial conference.

Rule 2. Continuances and Attendance

A. Motion for Continuance. In the event the United States Attorney or the defendant's attorney deems it necessary to make a motion for continuance in any particular case, notice of motion for continuance must be given to the opposing counsel, if known, at least five days prior to the date of the convening of court, unless the cause for continuance happens during said five day period. Unless such notice of motion for continuance is given, as herein provided, a continuance will not be allowed except under extraordinary circumstances.

B. Attendance of Defendants and Attorneys. All defendants and their attorneys shall be in court at the opening of court on the date the defendant is to appear according to his undertaking or notice to appear, unless other arrangements have been made with the United States Attorney.

Rule 3. Motions

Unless a different procedure is permitted by the Federal Rules of Criminal Procedure, motions in criminal cases, and particularly motions made under Rules 7(f), 12, 16, 21, and 41(e), Federal Rules of Criminal Procedure, shall be in writing and state the grounds upon which made and the relief or order sought. Such motions shall be filed with the clerk and a copy served upon the United States Attorney, at least five days prior to the date of arraignment, and must either set forth the grounds and authority for the motion or be accompanied by a brief substantiating the position of the movant. The court may, however, in exceptional circumstances and for good causes shown, allow such motions to be made at a time later than that fixed by this rule.

Rule 4. Pleas in Mitigation of Punishment and Motions for Reduction or Correction of Sentences

A. Pleas in Open Court. Except in unusual circumstances, pleas in mitigation of punishment and motions for reduction of sentence shall be made only in open court during session time.

B. Motions Under Rule 35, F.R.Cr.P. Motions for reduction or correction of sentences under Rule 35, Federal Rules of Criminal Procedure, shall be filed in writing with the clerk or judge of the United States District Court or made orally in open court.

IV. Rules in Bankruptcy

[Cite as follows:

Bankr. Rule, U. S. Dist. Ct., E.D.N.C.]

Rule 1. Efficiency in Administration

These rules shall at all times be interpreted and enforced in such manner as will avoid technical delay, permit prompt and speedy consideration and determination of all pending matters, and promote efficient administration in all proceedings under the Bankruptcy Act in this court.

Rule 2. Filing Fees

A. Original Petition. At the time of filing the petition initiating a proceeding under the Bankruptcy Act, the filing fees, except as provided in Rule 3 D below, shall be deposited with the clerk of court as follows:

1. For ordinary bankruptcy of an individual or a corporation. \$50.00. In partnership cases, \$50.00 for each partner and \$50.00 for the partnership.

2. For an arrangement under Chapter XI, \$50.00.

3. For a real property arrangement under Chapter XII, \$50.00.

4. For corporate reorganization under Chapter X, \$120.00 if no bankruptcy proceeding is pending, otherwise \$70.00.

5. Railroad reorganization under Chapter VIII, \$150.00.

6. For composition of a local taxing agency under Chapter IX, \$100.00.

7. For wage earner plan under Chapter XIII, \$15.00.

B. Reopened Cases. To reopen any closed bankruptcy proceeding there should be a deposit with the clerk of court of the sum of \$50.00.

C. Ancillary Proceedings. For ancillary proceedings there should be deposited with the clerk of court the sum of \$50.00 (\$10.00 to be refunded if no ancillary trustee is appointed).

D. Petitions in Pending Cases. The filing fees for petitions in pending cases are as follows:

1. Petition to reclaim property from a bankrupt estate, \$10.00.

2. Petition to review an order of the referee, \$10.00.

3. Objections to the discharge, \$10.00.

Comment: Petitions filed with the referee shall be accompanied by filing fees with checks made payable to the clerk of court.

E. Changes. This rule shall be deemed to be automatically amended to conform to any changes made in the above filing fees by act of Congress or by the Judicial Conference.

Rule 3. Filing Original Petitions and Schedules and Statement of Affairs

A. Number of Copies and Place to File. In bankruptcy petitions under Chapters I through VII of the Bankruptcy Act (ordinary bankruptcy), the schedule of assets and liabilities and the statement of affairs shall be filed in triplicate

originals with each of the three originals duly executed by the bankrupt and filed with the clerk of the court. In involuntary bankruptcy proceedings, the bankrupt should file with the referee within five days after adjudication the schedule of assets and liabilities and statement of affairs as required by Section 7 of the Bankruptcy Act.

Comment: Among the official forms adopted by the United States Supreme Court which have become a part of the Bankruptcy Act as found in the United States Code, are Form No. 1 which constitutes the petition and schedule of assets and liabilities, and Form No. 2 which constitutes the statement of affairs. Official Form No. 5 constitutes the petition for an involuntary proceeding. These forms, except the involuntary forms, are commercially printed and distributed rather widely and may be obtained from local legal supply houses.

B. Full Name and Trade Names. The bankrupt's full name shall be set out in the petition. In voluntary bankruptcy proceedings, all assumed, fictitious or trade names and any other names or designations by or under which the bankrupt has been known or has conducted any business within six years next preceding the filing of the petition in bankruptcy shall be set forth in the petition. In involuntary proceedings, such facts shall be set forth in the petition to the best knowledge, information, and belief of the petitioning creditors. In all cases, such facts shall be set forth in the notices to the creditors of the first meeting of creditors.

C. Listing Creditors. The list of creditors in the schedule of assets and liabilities should be accurate and complete. The street number, city, and state should be listed after each creditor with sufficient accuracy to assure mail delivery.

Comment: An inadequate or incomplete mailing address may result in the bankrupt not being discharged of that indebtedness on the ground of insufficient notice to the creditor.

D. Inability to Pay Filing Fee. A petition in a voluntary proceeding under Chapters I through VII or Chapter XIII of the Bankruptcy Act may be accepted for filing by the clerk of court if accompanied by a verified petition by the bankrupt stating that the petitioner is without and cannot obtain the money with which to pay the filing fee in full at the time of filing, accompanied by an affidavit of the petitioner's attorney that the attorney has not and will not accept any compensation for his services as such attorney until such filing fee is paid in full. The bankrupt's petition shall state the facts showing necessity for payment of the filing fees in installments and shall set forth the terms upon which the bankrupt proposes to pay such fees. No discharge shall be granted until the filing fee is paid in full.

Comment: The limitations and provisions in respect to the installments as well as the fact that the proceeding may be dismissed on failure to pay the costs is contained in General Order No. 35.

E. Partnerships. Where a petition in bankruptcy involves a partnership, the petition should clearly indicate whether the individual partners are included as bankrupts with the partnership and whether the partners are to be adjudged bankrupts individually along with the partnership. There shall be separate adjudications for each individual and for the partnership. Whether the partners are adjudicated individually or not, the schedule of assets and liabilities should contain a separate list of the assets and liabilities of each partner.

Comment: The discharge of a partnership shall not discharge the individual partners thereof from the partnership debts. Therefore, it is most important to the partners that the petition and the adjudication include the partners. As to the treatment of the partnership and the partners in bankruptcy, see Section 5 of the Bankruptcy Act.

F. Personal Property Exemptions. The \$500.00 personal property exemption of the bankrupt as recognized under the laws of the State of North Carolina should be claimed by the bankrupt in the schedule of assets and liabilities. If

the bankrupt does not claim the exempt property, the failure to do so will be considered a waiver of his rights to the said exemption. It will be sufficient to protect such rights to claim the \$500.00 exemption without identifying any particular property to be included in the allotment.

G. Estates by the Entirety. When one spouse is adjudicated a bankrupt, real estate held by the entirety is not an asset of the bankrupt estate. However, the schedule of assets and liabilities as filed by the bankrupt should indicate what property is held by the entirety, giving the approximate date of purchase, the present value, and the location of the property. The value of said property should not be listed in the total value of the bankrupt estate.

H. Life Insurance Exemption. The cash surrender value of life insurance of the bankrupt is exempt if the bankrupt's wife or children are designated beneficiaries. However, the name of the insurance company, policy number, date of issuance and name of beneficiary as well as the face amount of the policy, should be listed in the schedule of assets and liabilities by the bankrupt. The value of the policy should not be included with the total assets of the estate. The trustee, in allotting the exemptions of the bankrupt, should allot such life insurance by name of company, number of policy, etc., as indicated in the schedule of assets and liabilities.

Rule 4. Appearance of Attorneys

A. Qualified Attorneys. Appearance of attorneys shall be limited to attorneys admitted to practice in the United States District Court for the Eastern District, the Middle District or the Western District of North Carolina. Before any such attorney makes an appearance, he shall upon request furnish satisfactory proof showing that he has been so admitted to practice and is in good standing; provided, however, that any out-of-state attorney may be permitted to appear if he shall have associated with him an attorney duly qualified as above set forth. No proof of claim shall be filed by an attorney not qualified as above set forth. No proof of claim shall be filed by any individual, collecting agency, corporation, or association which is not a creditor. However, any individual, firm, or corporation which is a creditor may file a proof of claim in its own behalf without the use of an attorney.

B. Disposition of Claims Filed by Disqualified Persons. Any claim received by the referee from an attorney, person, or corporation disqualified to file claims as above-indicated shall be filed and entered by the referee, provided the claim indicates the mailing address of the creditor. If no complete mailing address of the creditor appears on the claim, then the claim with a copy of this rule shall be returned to the disqualified party attempting to file the claim. If the claim is filed, a copy of this rule shall be forwarded by the referee to the sender of the claim to serve as notice that he is not qualified to file such a claim and will not be recognized as an attorney in this court.

Rule 5. Employment of Attorneys

A receiver or trustee shall not employ an attorney except as provided by General Order 44.

Rule 6. Compensation of Attorneys

A. Petition for Fee. An attorney for a receiver, trustee, petitioning creditor, bankrupt, or debtor shall be allowed compensation only for services necessarily and actually rendered and expenses necessarily and actually incurred and paid. An attorney entitled to compensation for services shall file with the referee his petition under oath setting forth the value and extent of the services rendered in detail, indicating the amount requested and what amount, if any, has heretofore been paid to him.

B. Division of Fees. The petition by an attorney for attorney's fees shall be accompanied by his affidavit stating whether an agreement or understanding existed between the attorney and any other person for a division of the compensation and, if so, the nature and the particulars thereof. The affidavit shall state that no division of fees will be made except as indicated therein.

Comment: If the division is with the attorney's law partner, such should be indicated. However, the manner or percentage of division is not required to be disclosed. The restrictions on divisions of fees are contained in Section 62 c of the Bankruptcy Act. For a suggested form for the affidavit, see Form No. 2 in the Appendix to these rules.

C. Fixing Fees. In fixing compensation of an attorney, the following factors shall be taken into consideration:

1. Amount of work done.
2. Length of time employed.
3. Difficulties or intricacies of the bankruptcy proceeding.
4. Results accomplished.
5. Amount involved in connection with services rendered.
6. Size of the estate.
7. The skill required and experience of counsel in similar cases.
8. Contingency or uncertainty of compensation.

D. North Carolina Bar Association Rates. When computing compensation on the basis of time and depending on importance of the case, the referee may consider the recommended minimum fee schedule of the North Carolina Bar Association.

Rule 7. Petitions, Orders, and Pleadings After Reference

A. Filed With Referee. After a proceeding has been referred to the referee all petitions, pleadings, and applications for orders within the referee's jurisdiction shall be made to the referee and filed with the referee.

B. Verification. All petitions, reports, and applications containing any allegation of fact must be verified.

Comment: The official caption and verification in bankruptcy proceedings is set forth in Form No. 1, Appendix to these rules.

C. Service on Trustee. Any person filing a petition to reclaim property or for the release of any rights to property, shall serve a copy of such petition on the trustee or his attorney by mailing the same to him and attaching a statement of such service to the petition as filed with the referee.

D. Manuscript Covers. Petitions, applications, and orders filed with the referee should not have manuscript covers unless such covers are necessary to protect exhibits attached.

Rule 8. Petition for Discharge of Bankrupt

A. Individual or Partnership. The adjudication of an individual or a partnership operates as an application for a discharge and no further petition is necessary.

B. Corporation. If a discharge of a corporation is desired, a petition for such discharge must be filed within six months after the adjudication.

Rule 9. Objections to Discharge

The objection to the discharge may contain one or more specifications of the grounds of opposition to such discharge. Each specification should be numbered and reference made to the applicable sub-paragraph of Section 14c of the Bankruptcy Act. Each specification should allege the essential facts and all the elements constituting the bar to discharge and not merely allege generalities or conclusions. A specification alleged in the words of the statute alone is not suffi-

cient except where the specification is under Section 14c (2) of the Bankruptcy Act for failing to keep accounts and records from which the bankrupt's financial condition and business transactions might be ascertained.

Comment: For the \$10.00 filing fee for objections to discharge, see Rule 2 D of these rules. Official Form No. 44, Specification of Objections to Discharge, is set forth as Form No. 3 in the Appendix to these rules.

Rule 10. Federal Rules of Civil Procedure

A. Applicability of the Federal Rules of Civil Procedure. The Federal Rules of Civil Procedure shall, insofar as they are not inconsistent with the Bankruptcy Act and the General Orders, be followed as nearly as may be, pursuant to General Order in Bankruptcy No. 37.

B. Pre-Trial Conferences. The pre-trial conference procedure under Rule 16, Federal Rules of Civil Procedure, and the rules of this court, shall be used by the referee to its fullest advantage. Request for a pre-trial conference may be made by written motion by any party to any matter being litigated before the referee in bankruptcy.

Comment: The purpose and scope of the pre-trial conference before the referee in involved and complicated matters will be similar and as binding on the parties as a pre-trial conference under the rules of this court.

Rule 11. Filing Claims

A. Form. Proof of claim should be presented on a regular proof of claim form as prescribed by the Bankruptcy Act, being Official Forms Nos. 28, 29, 30, and 31. The proof of claim should have attached to it an itemized statement of the account. If the claim is based on a note or written contract, the original of said instrument shall be attached. A true copy or photostatic copy may be substituted for the original by order of the referee. All credits should be shown by date, character and amount within the last six months.

Comment: Commercial printers usually combine the four forms into one printed form which is used in filing claims and most frequently referred to as "Proof of Claim Form in Bankruptcy". These forms can be obtained from almost any legal supply company.

B. Where Filed. All claims should be filed with the referee. Any proof of claim received by the clerk or by the trustee shall immediately be forwarded to the referee, where all claims shall be filed, as provided by General Order in Bankruptcy No. 24.

C. Time for Filing. Claims must be filed within six months after the first date set for the first meeting of creditors.

Comment: See Section 57 of the Bankruptcy Act in regard to filing claims. A claim must be filed in bankruptcy in order to participate in any dividend. A prior filing in a state receivership or other solvency proceeding does not constitute a filing in the bankruptcy court.

Rule 12. Solicitation of Proxies and Voting

A. Attorney at Law. An attorney desiring to vote more than one claim under power of attorney or proxy at any meeting of creditors may be required by the referee in his discretion to furnish information prior to such voting to include:

1. The names and amounts of the claims he desires to vote.
2. Whether any of the creditors' claims he desires to vote are his regular clients and, if so, their names and the approximate length of time they have been such regular clients.
3. The name of the person from whom he received the claims of creditors who are not his regular clients and the nature of his connection with such person or association or company.
4. Whether the claims of creditors other than his regular clients have been solicited and, if so, by whom.

5. Whether the said claims will be voted in an interest other than that of general creditors.

B. Inquiry by Referee as to Solicitation of Proxies. The referee at his own instance or at the request of any party in interest in the proceeding may make or permit inquiry to be made as to the solicitation of claims voted or to be voted. If upon such inquiry it appears that any claims, powers of attorney, or proxies have been solicited with the intent or purpose of voting them at any meeting or hearing in the interest of the bankrupt or in the interest other than that of general creditors, the referee shall not allow the voting of such claims under such powers of attorney or proxies. If, in the opinion of the referee, the election of the trustee or the determination of any other matter to be submitted is likely to be unfairly affected by such disallowance, the referee may adjourn the meeting and notify the creditors who executed such powers of attorney or proxies of the adjourned date of the meeting to afford them an opportunity to attend and vote or to execute new powers of attorney or proxies.

Rule 13. Appeals from Referee

A. Petition for Review. Any person aggrieved by an order of the referee may, within 10 days after the entry of such order, or within such time as extended by the referee for good cause shown, file with the referee a petition for review of such order by the court, as provided by Section 39c of the Bankruptcy Act.

B. Service of Petition and Brief. A copy of the petition, together with a copy of the brief as hereinafter mentioned, shall be served upon the adverse parties who were represented at the hearing by mailing copies of the same to the said parties or their attorneys of record, such service being indicated by a statement filed with the petition for review. The petition for review shall set forth the order complained of and the alleged errors in respect to such order.

Comment: An unofficial form for petitions for review may be found in *Collier on Bankruptcy* and *Remington on Bankruptcy*. See Unofficial Form No. 1000 at page 3861, Vol. 5, *Collier on Bankruptcy*, and Unofficial Form No. 3500 at page 810 in the volume on Forms, *Remington on Bankruptcy*. There are valuable comments and suggestions under each of the forms cited. There is a \$10.00 filing fee for each petition for review as referred to in Rule 2 D above.

C. Briefs. Every petition for review should be accompanied by a brief in support of the alleged errors and the person filing said brief shall serve a copy thereof on the adverse parties who were represented at the hearing or their attorneys of record. Within 10 days after the referee files with the clerk his certificate for review, the opposing party shall file with the clerk and serve upon the petitioner his answering brief.

D. Hearing on Petitions for Review. The referee shall furnish the clerk of court the name and address of each attorney for the interested parties having appeared in the hearing before him simultaneously with the transferral of the certificate of the referee to the court on the petition for review. Each attorney for the interested parties shall be notified by the referee of the forwarding of the certificate of review to the clerk's office. The clerk, upon receipt of the certificate and the names of the attorneys for the interested parties, shall immediately make arrangements for, or cause to be set, a hearing on the said petition for review and notify each interested party through his attorney of the date and hour of said hearing. No further notice shall be required of the hearing on the petition for review.

Rule 14. Depositories

A. Place of Deposit. Receivers and trustees shall deposit all bankruptcy funds in the banks within the district as shall be designated as such depositories, and as directed from time to time; and all funds shall be disbursed by check and counter-signed by the referee.

B. Monthly Report by Bank. Each depository having funds on deposit in bankruptcy cases will report to the referee and to the clerk of court not later than the tenth day of each month the name and the amount on deposit in each such case in the respective bank as of the last day of the preceding month. The acceptance of the account by the depository is an implied agreement to abide by and be subject to these rules in regard to deposits.

Appendix of Bankruptcy Forms

FORM 1.

Official Caption and Verification

(See Bankr Rule 7 B)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN
DISTRICT OF NORTH CAROLINA

..... DIVISION

In the Matter of } In Bankruptcy No.
..... } PETITION
Bankrupt.

To the Honorable, Referee in Bankruptcy:

(CONTENTS OF PETITION)

.....
Petitioner

.....
Attorney for Petitioner

State of

County of

I,, the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

.....
Petitioner

Sworn to and subscribed before me
this day of, 19...

.....
Notary Public (or other official)

My commission expires:

FORM 2.

Division of Attorney's Fee, Affidavit

(See Bankr. Rule 6 B)

(Caption as in Form 1.)

....., being duly sworn, deposes and says:

That he is a petitioner in the above bankruptcy proceeding for compensation as attorney for; that no agreement has been made directly or indirectly by him, and no understanding exists between him and any other person for a division of compensation except as follows:; and that no division of fees prohibited in Section 62c of the Bankruptcy Act will be made by the applicant.

.....
Applicant

(Verification as in Form 1.)

FORM 3.

Specification of Objections to Discharge

(See Bankr. Rule 9)

(Caption as in Form 1.)

....., of, in the County of, State of, the trustee of the estate (or a creditor) of the above named bankrupt (or the United States Attorney for said district or the attorney designated by the Attorney General of the United States), having examined into the acts and conduct of said bankrupt and being satisfied that probable grounds exist for the denial of the discharge of said bankrupt and that the public interest so warrants, does hereby oppose the granting to said bankrupt of a discharge from his debts, and specifies the following as grounds of objections: (Here specify in separately numbered paragraphs the grounds of objections).

.....
Trustee (or creditor, etc.)

(Verification as in Form 1.)

V. Naturalization

[*Cite as follows:*

Natn. Rule, U. S. Dist. Ct., E.D.N.C.]

Rule 1. Procedure

In accordance with Title 8 U. S. C. §§1445 (c), 1447(a) and (e), and related statutes, the stated day for consideration of, and final action on, petitions for naturalization shall be Wednesday of the first week of any regular session of court at which naturalization hearings are set. Petitions for naturalization will not be considered on other days, except that, in the discretion of the court and for good cause shown, applications for the naturalization of members of the armed services, and seamen on merchant vessels registered under the laws of the United States, and members of the immediate families and dependents of said personnel, may be considered at other times when the court is in session. But in such exceptional cases, the applicant must have given reasonable prior notice to the Immigration and Naturalization Service as to the time when his or her application is requested to be submitted to the court for action. The court may also, upon like notice to the Immigration and Naturalization Service, entertain and act on petitions for naturalization at other times than the stated days in the discretion of the court for good cause shown in exceptional cases, and not inconsistent with the statutes of the United States.

VI. Supplemental Rules for Certain Admiralty and Maritime Claims

[*Cite as follows:*

Supp. Rule, U. S. Dist. Ct., E.D.N.C.]

Rule 1. Process; Return of Same

All process shall be issued by the clerk with a notation or symbol identifying the claim as admiralty or maritime, and suit shall be commenced by filing the complaint or original pleading in the office of the clerk. Process *in personam* and *in rem* shall be returnable on or before the return day thereof at the clerk's of-

file, and shall be served on or before the return day, unless otherwise ordered. The return upon process *in rem* shall state the date of seizure or of sale, as the case may be. Appearance or claim in suits *in rem* shall be filed within ten days of service, and when none is filed, a proper decree, interlocutory or final, may be entered. All process shall be returnable within fourteen days after issuance, but the return date may be extended by order of court.

Rule 2. Service of Process—How Made and When Completed

Service of all process shall be by the marshal, unless otherwise ordered by the court. In suits *in personam* process shall be served upon the respondent or party to be served by leaving with him, or with his duly constituted agent, or at his last known place of business or address in the district, a copy of the same, which shall state the time and place for filing claim, answer or other pleading, and the name of the attorney, and service shall thereupon be deemed completed. In suits *in personam* process may also be served upon the respondent or party to be served in accordance with the provisions of Rule 4, subsections (c), (d), (e), and (h) of the Federal Rules of Civil Procedure, Title 28 U.S.C. In suits *in rem* process shall be served by the arrest of the vessel or *res* to be served and by publication of Notice of Arrest. Service in suits *in rem* shall be deemed completed upon the completion of publication of the Notice of Arrest, to be proved by affidavit of the marshal or duly authorized agent of the newspaper wherein the notice appeared.

Rule 3. Publication

(a) *Notice of Arrest.* Unless otherwise ordered or provided by law, notice of arrest of property in suits *in rem* shall be published at least once within one week after the date on which the process is returnable, and shall contain the title of the cause, the nature of the cause of action, the amount demanded, the time and place for filing claim, answer or other pleading and names of the marshal and attorney, and shall state that all interested persons should appear, or otherwise default will be noted and condemnation ordered. Such publication shall be in a newspaper of general circulation published in the division of the district where the suit is pending.

(b) *Hearing After Publication.* When the *res* remains in custody of the marshal, the cause will not be heard until after publication of process shall have been made in that cause, or in some other pending cause in which the property is held in custody. No final decree shall be entered ordering the condemnation and sale of property, not perishable, arrested under process *in rem*, unless publication of process in that cause shall have been duly made.

(c) *Notice of Sale, Suits in Rem; Daily Publication.* Unless otherwise ordered or provided by law, notice of sale of property after condemnation in suits *in rem* shall be published daily for at least six days before sale.

(d) *Sale of Res by Interlocutory Decree.* No sale of the *res* shall be ordered by interlocutory decree before the sum chargeable thereon is fixed by the court, except by consent of the parties or by order of the court.

Rule 4. Duty of the Marshal Upon the Arrest or Attachment of Vessel or Other Property

It shall be the duty of the marshal upon the arrest or attachment of any vessel by process *in rem* or foreign attachment to notify the collector of customs of the port where the vessel or other property has been arrested or attached, if and only if such vessel or property is required to have clearance from the collector of customs before leaving port, and the marshal shall request the collector of customs to refuse clearance to any such vessel or property until the marshal or other proper person has notified the collector of customs that the vessel may proceed free of the arrest or attachment. In all other cases it shall

be the duty of the marshal to take all reasonable precautions to secure the custody of the vessel or *res* arrested or attached, and any costs or expenses so incurred shall become a part of the costs of court in the suit.

Rule 5. Property in Possession of Collector

(a) *Notice to Collector Requiring Detention of Property.* In suits *in rem* when the *res* is in the custody of the collector of customs the marshal shall, in addition to the publication of the process provided for by Rule 3, deliver a copy of the process to the collector together with notice of the attachment of the property therein described and require the collector to detain such property in custody until the further order of the court.

(b) *Collector Not in District; Notice to Custodian of Res.* In case the collector is not found within the district, then a copy of such process and notice shall be delivered to the custodian of the property within the district.

(c) *Notice to Owners or Agent.* Notice of the attachment shall also be given to the owner or his agent if found within the district and, if the owner or his agent cannot be found within the district or if such owner or agent be unknown, then the publication of such notice shall be deemed sufficient, unless the court shall otherwise direct.

Rule 6. Security for Costs

(a) *Bond Required.* No complaint or petition shall be filed, except on the part of the United States, or on the special order of the court, or when otherwise provided by law, or by these rules, unless the party offering the same shall file a bond for costs, conditioned that the principal shall pay all costs awarded by the court, and, in case of appeal, by any appellate court, against him, it or them. In suits *in personam*, such bond shall be in the sum of \$100.00; in suits *in rem*, or where process of attachment is to be issued, the bond shall be in the sum of \$250.00. In lieu of a bond the party may deposit the necessary amount in the registry of the court.

(b) *Special Suitors, Bond Not Required.* Seamen or their personal representatives suing for wages in their own right and for their own benefit for services on board American vessels or for injury, death, and maintenance and cure under Section 688, Title 46, United States Code, or under the general maritime law; salvors coming into port in possession of the property claimed; petitioners for money in the registry of the court, shall not be required to give such security in the first instance. The court, however, may on motion order the usual bond to be given.

Rule 7. Verification of Pleadings and Interrogatories

Verification of claims to property, pleadings, when required, and answers to interrogatories shall be by the parties or one of them, and if a corporate party, by an officer thereof. If the individual party or all officers of the corporate party are not within the district, the verification may be made by an agent, attorney-in-fact or attorney, who shall state briefly the sources of his knowledge or information, declare that the document affirmed to is true to the best of his knowledge, information and belief, and state the reason why the verification is not made by the party.

Rule 8. Time to Plead or Except; Interrogatories

Unless the court directs otherwise:

(a) *Time for Answer After Issuance of Process.* When process *in personam* is issued the answer, exceptions or exceptive allegations to the complaint or petition shall be filed within twenty days after service.

(b) *Time for Answer Before Issuance of Process After Filing of Claim.* When process *in rem* has been issued, and a claim or notice of appearance has been filed

within ten days of service completion, the answer, exceptions or exceptive allegations shall be filed within twenty days thereafter.

(c) *Time for Filing Exceptions to Answer.* Exceptions or exceptive allegations to the answer must be filed within twenty days after receipt of a copy of the answer.

(d) *Time for Amending Pleadings After Submission to Exceptions.* If a party submits to exceptions he shall amend his pleading with respect to the matters excepted to within twenty days after service of a copy of the exceptions.

(e) *Exceptions Overruled; Time for Answer.* If exceptions to a pleading or to an interrogatory be overruled, the party excepting may answer within twenty days after the service of a copy of the order on his attorney.

(f) *Time for Answer; United States as Respondent.* In all suits in which the United States shall be defendant in any action with respect to any admiralty or maritime claims, the answer shall be filed within sixty days after the completion of said service.

Rule 9. Joinder

(a) *Joinder at Commencement of Action.* Parties may sue and parties (including a vessel or other *res*) may be sued either jointly, severally or alternatively in one suit, and persons having separate causes of action may join in one suit if the causes of action involve substantially the same questions and arise out of the same transactions.

(b) *Intervention After Commencement of Action.* Persons who, under the preceding paragraph of this rule, might have joined as co-plaintiffs, and, in suits for wages, any other seamen claiming wages for the same voyage, not made parties in the original complaint, may, upon petition, be admitted to prosecute as co-plaintiffs upon such terms as the court may deem reasonable.

Rule 10. Consolidation

When various suits are pending, all resting upon the same matter of right or defense, although there be no common interest between the parties, the court may consolidate or compel said suits to be tried together, and enter a single decree or decrees in each cause.

Rule 11. Severance

At any stage of the proceeding, if it appears to the court's satisfaction that the plaintiff is entitled to recover a part of the claim or claims set forth in the complaint and respondent does not claim any recoupment, offset, or counter-claim in respect of said part, the court may, upon motion, make an order of severance and enter an appropriate decree all without prejudice to the further prosecution of the cause with respect to the remaining issues.

Rule 12. Substitution of Parties

When by reason of the death or incompetency of any of the parties, changes of interest in the suit, defects in the pleadings or proceedings, or otherwise, new or substituted parties to the suit are necessary or proper, persons, upon their own petition or upon petition of any party to the cause, may be made parties by appropriate order *ex parte* if no appearance or claim has been filed, otherwise the said application shall be made on notice to all parties who have filed appearance or claim. The order may provide for the issuance of process.

Rule 13. Attachments

(a) *Sufficiency of Service in Proceedings in Personam.* In proceeding *in personam* where the debts, credits or effects named in any process of foreign attachment are not delivered up to the marshal by the garnishee or are denied by him to be the property of the respondent it shall be a sufficient service of such

foreign attachments to leave a copy thereof with such garnishee, or at his usual residence or place of business, with notice of the property attached. On due return thereof by the marshal, the plaintiff, on proof satisfactory to the court that the property belongs to respondent, may proceed to a hearing and final decree in the cause.

(b) *Sufficiency of Service in Proceedings in Rem.* In proceedings *in rem*, process against freight or proceeds of property in possession of any person, and all orders granted by the court under the Supreme Court Supplemental Rules for Certain Admiralty and Maritime Claims in similar cases may be served in like manner.

Rule 14. Appraisements and Appraisers

(a) *Order for Appraisal Upon Seizure of Property for the United States.* In case of seizure of property in behalf of the United States, an appraisal for the purpose of bonding the same may be had by any party in interest, on giving one day's previous notice of motion for the appointment of appraisers. If the parties or their attorneys and the United States attorney are present in court, such motion may be made instantler, after seizure and without previous notice.

(b) *Orders for Appraisal Upon Seizure of Property for Private Party.* Orders for the appraisal of property under arrest or attachment at the suit of a private party may be entered as of course, at the instance of any party interested, or upon the consent of the attorneys for the respective parties.

(c) *Appointment of Appraiser.* Only one appraiser is to be appointed, unless otherwise ordered, and, if the respective parties do not agree in writing upon the appraiser to be appointed, the judge shall name him.

(d) *Notice of Making Appraisal; Filing of Appraisal.* The appraiser shall give one day's notice of the time and place of making the appraisal to the attorneys in the cause. The appraisal when made shall be filed with the clerk.

Rule 15. Release of Seizures

Property seized by the marshal may be released as follows:

(a) *Giving Bond.* By giving bond as provided by Title 28 U. S. Code, Section 2464 and Supreme Court Supplemental Rules for Certain Admiralty and Maritime Claims.

(b) *Suits for Sum Certain; Payment Into Court.* In suits for sums certain, by paying into court the amount alleged in the complaint as due, with interest as claimed therein up to the term next succeeding the return day or by filing an approved bond for such alleged amount, with interest, and by payment into court of the costs of officers of the court already accrued, and by depositing also the sum of \$250.00, to cover further costs; or in lieu of such deposit for costs giving bond for costs in the usual form.

(c) *Suits Not Possessory, Petitory or Licitation; Filing Approved Bond.* In suits, other than possessory, petitory or licitation, by filing an approved bond for the amount of the appraised or agreed value of the property seized with interest (unless the same is modified by an order of the court), conditioned to abide by all orders of the court, interlocutory or final, and to pay the amount awarded by the final decree rendered by the court, or by any appellate court, if an appeal intervene, with interest and costs.

(d) *Possessory, Petitory and Licitation Suits Upon Order of Court.* In possessory, petitory and licitation suits upon the order of the court only, and on such security and terms as ordered.

(e) *Clerk's Order Upon Consent of Detaining Attorney.* By an order duly entered by the clerk upon the written consent of the attorney for the party on whose behalf the property is detained.

Rule 16. Summary Release From Arrest or Attachment

Where there is an arrest of the person, or where property is attached, the party arrested or any person having a right to intervene in respect of the thing attached, may, upon evidence showing any improper practice or a manifest want of equity on the part of the plaintiff be entitled to an order requiring the plaintiff to show cause instantly why the arrest or attachment should not be vacated. This rule shall have no application to suits for seaman's wages when process is issued upon a certificate of sufficient cause filed pursuant to Sections 4546 and 4547 of the Revised Statutes (Title 46 U. S. Code, Sections 603 and 604).

Rule 17. Decree of Default

(a) *Decree by Default at Expiration of Time for Answer.* On the expiration of the time to answer, if no pleading, exceptions or exceptive allegations have been filed, the plaintiff or petitioner may enter, by default, an interlocutory or final decree as may be appropriate, without notice, unless the claimant or respondent has appeared by attorney, in which case at least five days notice of the submission of such decree shall be given.

(b) *Final Decree in Suits Involving Attachment; Notice Required.* In any suit *in rem*, or *in personam*, where debts, credits or effects have been attached and there has been no appearance, a final decree will not enter unless notice of the suit has been given by personal service or by mail, to the owner or agent of the property arrested or attached at his last known address or to the master or person in charge of a vessel in custody. Such notice shall be in addition to the proof of publication of the notice of arrest and shall specify the date the complaint was filed and by whom and the date the property was arrested or attached. If it be made to appear to the court that such notice cannot be given or is unnecessary, then proof of the publication of the process and attachment of the *res* thereunder shall be sufficient.

(c) *Final Decree in Breach of Contract Actions, Damages Liquidated.* Unless the court otherwise directs, in all cases where an interlocutory decree may be entered under sub-division (a), a final decree on default may be entered where the complaint is for breach of contract and the damages are liquidated, upon affidavit or other proof satisfactory to the court, without the requirement of a reference to a commissioner or hearing by the court.

Rule 18. Tender, and Notices Before Trial in Limitations of Damage

(a) *Tender Prior to Suit; Prior to Filing Answer.* A tender *inter partes* before suit shall be of no avail in defense, or in discharge of costs, unless, before the answer is filed, the amount so tendered shall be deposited in court to abide the final order or decree. In case of such deposit, the respondent or claimant shall recover costs, unless the plaintiff shall recover a sum in excess of the amount of the tender, without interest after the date of the tender.

(b) *Withdrawal of Tender by Plaintiff.* The plaintiff may at any time on notice take an order for the withdrawal of so much of the tender or amount deposited as the court may allow, without prejudice to continuing the litigation for a larger amount leaving in the registry a sum sufficient to cover the respondent's or claimant's costs, in case the amount deposited should be held in the court, or in any appellate court, to be a sufficient tender.

(c) *Effect of Consent That Tender Be Paid to Plaintiff.* If the respondent or claimant serves on the attorney for the plaintiff written notice of consent that the whole, or any specific part, of the tender deposited to be paid to the plaintiff, the respondent or claimant shall not be liable thereafter for interest on so much of the plaintiff's claim.

(d) *Offer of Decree Prior to Trial.* At any time before trial a respondent or

claimant may serve and file a written offer to allow a decree to be entered for a sum therein specified, with costs to the date of the offer. The respondent or claimant shall recover costs from the date of filing of the offer unless the plaintiff shall recover damages in excess of the amount of the offer, without interest after the date of filing of the offer.

(e) *Court's Discretion: Costs and Disbursements.* Nothing, however, in this rule shall be held to control the discretion of the court in respect of costs and disbursements.

Rule 19. Offer of Damages After Interlocutory Decree

At any time after an interlocutory decree in favor of the plaintiff, the respondent or claimant, without prejudice to his right to appeal, may serve and file a written offer to allow plaintiff's damages to be assessed at a sum of money therein specified with interest, if allowable, and with costs, to be taxed to the date of the offer. Said respondent or claimant shall recover costs from the date of the offer, unless the plaintiff shall obtain a final decree wherein the damages awarded (without interest or costs after offer) exceed the amount of the offer.

Rule 20. Commissioners' Reports and Fees

(a) *Appointment of Commissioner; Fixing Time and Place for Hearing.* When a reference is made, the clerk shall forthwith notify the commissioner of his appointment. Any of the parties may fix the time and place for the hearing by giving at least ten days' notice in writing to the other parties or their attorneys and to the commissioner.

(b) *Disposition of Commissioner's Report.* The report of the commissioner together with the transcript of the proceedings and the exhibits, shall be filed by him with the clerk. Upon the filing of his report, the commissioner shall furnish the clerk with sufficient copies of a notice of filing thereof addressed severally to the parties or their attorneys to enable the clerk to mail a copy to each of them. In no event shall the commissioner retain his report as security or withhold prompt filing of the same because of failure to pay his fee.

(c) *Nonpayment of Commissioner's Fee; Exceptions to Amount; Payment Enforced by Court.* If the fee of the commissioner shall not have been paid upon the filing of the report, he shall certify, by endorsement on the report, the amount of the fee and the fact that it has not been paid. Exceptions to the amount of such fee may be filed in like manner as to the report. After the filing of such report, if it appears that the fee of the commissioner has not been paid, the court by appropriate proceedings may enforce payment thereof in favor of such officer against any party or the *res* liable therefor. At the instance of any party the fee of such commissioner shall be taxed as costs by the clerk.

(d) *Exceptions to Commissioners' Reports.* Exceptions to the reports of commissioners shall be filed within ten days after service of notice of filing of the report, in default of which the report may be confirmed at the instance of any party by order entered without notice, upon proof of service of notice of filing the report and default in filing exceptions.

Rule 21. Judicial Sale, Return of, by Marshal

(a) *Disposition of Proceeds of Judicial Sale; Filing of Marshal's Account.* When any money shall come to the hands of the marshal under or by virtue of any order or process of the court, he shall forthwith present to the clerk a bill of his charges thereon and a statement of the time of receipt of the money and upon the filing of the statement and the taxation of the charges he shall forthwith pay to the clerk the gross amount of said money, and such statement and charges shall be paid as part of the bill of costs. An account of all property sold under the order or decree of this court shall be returned by the marshal and filed in

the clerk's office, with the execution or other process under which the sale was made.

(b) *Wharfage, Storage and Like Charges While Property in Marshal's Custody.* Wharfage, storage, and like charges which accrue while the vessel or other property is in the marshal's custody shall not be included in the marshal's bill of charges, except by consent of all interested parties, lienors who have appeared, or their attorneys. If such charges are not consented to in the marshal's bill, they may be claimed by petition filed, unless otherwise ordered, not later than ten days after sale of the vessel or other property, against the proceeds or against any party claimed to be responsible therefor. The wharfinger or other person entitled to such charges shall be given notice of settlement of the final decree and order of distribution of proceeds.

(c) *Bills of Costs.* All bills of costs shall be taxed by the clerk as in civil actions, and, upon reasonable notice, shall be subject to review by the court.

Rule 22. Claims After Sale—How Limited

In proceedings *in rem*, claims upon the proceeds of sale of property under a final decree, except for seamen's wages, will not be admitted in behalf of lienors who file complaints or petitions after the sale, to the prejudice of lienors who file complaints or petitions before the sale, but shall be limited to the remnants and surplus, unless for cause shown it shall be otherwise ordered.

Rule 23. Stay of Execution

Execution shall not issue for 10 days after service of a copy of the decree with notice of entry upon the adverse party, or his attorney, unless the decree shall have been entered on default or the court shall otherwise order.

Rule 24. Summons and Severance Abolished

Parties interested jointly, severally, or otherwise in a judgment or decree may join in an appeal therefrom; or, without summons and severance, any one or more of them may appeal separately or any two or more of them may join in an appeal.

Rule 25. Terminology

(a) *Court.* The word "court" shall mean a judge of the district or a judge holding the courts of the district.

(b) *Clerk.* The word "clerk" shall mean the clerk of the district court or any deputy clerk of the district.

(c) *Marshal.* The word "marshal" shall mean the marshal of the district or any deputy marshal of the district.

(d) *Service.* The word "service," except as otherwise provided by these rules or the Supreme Court rules, shall mean the delivery or mailing of the paper or instrument to be served to the party to be served or to his or its agent, officer, or attorney. The receipt of such a paper or instrument to be served by the party to be served or his or its agent, officer, or attorney, shall be proof of such service, whether the receipt of such a paper or instrument is from the clerk or from the serving or moving party or his or its attorney.

**The United States District Court
for the
Western District of North Carolina**

LOCAL RULES OF COURT

Effective the 1st day of April, 1965

**DIVISIONS OF THE DISTRICT SHOWING COUNTIES AND
PLACE OF HOLDING COURT IN EACH DIVISION**

Charlotte	Statesville	Shelby	Asheville	Bryson City
Anson	Alexander	Cleveland	Avery	Cherokee
Gaston	Burke	Lincoln	Buncombe	Clay
Mecklenburg	Caldwell	Rutherford	Haywood	Graham
Union	Catawba		Henderson	Jackson
	Iredell		Madison	Macon
			McDowell	Swain
			Mitchell	
			Polk	
			Transylvania	
			Yancey	

UNITED STATES DISTRICT JUDGES

JAMES BRAXTON CRAVEN, JR., *Chief Judge* Morganton, North Carolina
 WILSON WARLICK Newton, North Carolina

CLERK

THOMAS E. RHODES United States Post Office Bldg., Asheville, North
 Carolina
 Telephone: 254-0961 ext. 648

REFEREE IN BANKRUPTCY

J. HARRY SAMPLE 512 Gennett Building, Asheville, North Carolina
 Telephone: AL 4-6174

UNITED STATES PROBATION OFFICE

WILLIAM J. SEAGLE, *Chief Probation Officer* 302 Federal Building,
 Statesville, North Carolina
 Telephone: 872-1347

In the United States District Court for the Western District of North Carolina

ORDER PROMULGATING LOCAL RULES

The judges of this court acknowledge with grateful appreciation the advice and assistance of an able and distinguished committee representing the Bar of this district in preparing the Local Rules promulgated herein.

The members of the committee are:

Mr. James M. Baley, Jr., Attorney, Asheville, North Carolina
Mr. Sam J. Ervin, III, Attorney, Morganton, North Carolina
Mr. Fred B. Helms, Attorney, Charlotte, North Carolina
Mr. Hunter M. Jones, Attorney, Charlotte, North Carolina
Mr. Hugh L. Lobdell, Attorney, Charlotte, North Carolina
Mr. William Medford, U. S. Attorney, Asheville, North Carolina
Mr. Robert N. Robinson, Attorney, Charlotte, North Carolina
Mr. J. Harry Sample, Referee in Bankruptcy, Asheville, North Carolina
Mr. J. Paul Teal, Chief U. S. Deputy Marshal, Asheville, North Carolina
Mr. Thomas A. Uzzell, Jr., Attorney, Asheville, North Carolina
Mr. Robert R. Williams, Jr., Attorney, Asheville, North Carolina

It is ordered, effective this date, that the practice and procedure of this court will hereafter be governed and controlled by the Federal Rules of Civil and Criminal Procedure and these Local Rules, appended hereto, and hereby adopted. All other orders and rules with respect to practice and procedure, including Joint Rules of Practice for the Eastern, Middle, and Western Districts of North Carolina dated March 25, 1939, are hereby rescinded.

This 1st day of April, 1965.

J. BRAXTON CRAVEN, JR., *Chief Judge*
WILSON WARLICK, *District Judge*

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I. General Rules

Rule 1. Attorneys.

A. Eligibility and Admission. Any lawyer who is a member in good standing of the North Carolina State Bar is eligible for admission to the bar of this court, which admission shall be granted as a matter of course upon the payment of a fee in the amount of \$2.00 (Two Dollars) and upon taking the prescribed oath in open court which reads as follows:

I do solemnly swear that I am a member in good standing of the North Carolina State Bar entitled to practice law in the courts of general jurisdiction of the State of North Carolina, and I do further solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same and that I will demean myself as an attorney and officer of this court in accordance with the Canons of Ethics of the North Carolina State Bar and American Bar Association, and according to law.

I take this obligation freely without any mental reservation or purpose of evasion, so help me God.

Any lawyer who is a member in good standing in the United States District Court for the Middle and Eastern Districts of North Carolina may practice in this District without the necessity of taking the oath or paying the \$2.00 fee, and upon his appearance in this District shall be deemed a member of this District Bar.

It shall not be necessary for a member in good standing of the North Carolina State Bar to be formally admitted in this district in advance of making an appearance and filing papers; such attorney may be admitted *nunc pro tunc* at trial time.

B. Special Admissions. Any lawyer who is a member in good standing of the Bar of the Supreme Court of the United States or the Bar of the Supreme Court of any state in the United States may, in the discretion of the judges of this court, be permitted to appear in a particular case. If such permission is granted, and if a member of the bar of this court is not associated, said attorney and his client shall be deemed to have consented that service of all pleadings and notices may be made upon a deputy clerk in the appropriate division of this court as process agent. The court encourages such out-of-state attorneys to associate a member of the bar of this court in *all* cases, but will not require such association where the amount in controversy or the importance of the case does not appear to justify double employment of counsel. Special admissions will be the exception and not the rule, and no out-of-state lawyer will be permitted to practice frequently or regularly in this court without association of local counsel.

Where justice requires, the authorized deputy clerks at Asheville, Statesville and Charlotte may permit the filing of papers at the request of out-of-state counsel; provided, however, the further participation of out-of-state counsel shall be governed as hereinabove provided.

C. Withdrawal of Counsel. If it will not delay a scheduled hearing or trial, counsel may file written consent of their client to their withdrawal and at the same time cause to be filed an appearance by other counsel, and such substitution of counsel shall be effective without court approval. Except for such substitution of counsel, there shall be no effective withdrawal except on order signed by one of the judges of the court.

D. Presenting Judgments, Orders, and Communications to Judges. Judgments and orders submitted by counsel will ordinarily be sent to the clerk in the appropriate division and not to the judge, unless shortness of time or other good reason appears for sending them directly to the judge. Copies as may be needed will be certified by the clerk.

All communications (letters, briefs, enclosures, etc.) sent to a judge about a case must show a copy sent to opposing counsel, and copies must be sent to opposing counsel.

E. Filing of Papers. All orders and judgments shall be filed with the court in duplicate. All papers of every sort may be filed at Statesville, Charlotte, or Asheville, regardless of the Division in which the case may be pending as may suit the convenience of counsel.

Rule 2. Sessions.

The court shall be in continuous session in all divisions of the district, and all matters, criminal and civil, shall be subject to being called for hearing and trial at any time upon reasonable notice to the parties.

Regular terms for the disposition of criminal cases are now established as follows:

Statesville Division	—Third Monday, March and September
Charlotte Division	—First Monday, April and October
Shelby Division	—Third Monday, April and October
Asheville Division	—Second Monday, May and November
Bryson City Division	—Fourth Monday, May and November

Additional criminal sessions will be scheduled from time to time in all divisions as may be required to dispose of the criminal dockets promptly.

Trial calendars in civil cases will be prepared by the court, usually at the time of the Motion, Pre-trial and Settlement conference, or soon thereafter. Civil sessions of court will be held as often as necessary to accomplish, insofar as possible and except in the unusual cases, the following *illustrative* schedule of disposition of cases.

(a) In the unusual case where *both* sides press for trial and *both* counsel are diligent in preparation—not more, and usually less, than six months should elapse between filing of complaint and trial.

(b) When *one* side presses for an early trial, the time lapse from filing complaint to trial should not exceed nine months.

(c) Where neither side presses for an early trial, the time lapse from filing complaint to trial should not exceed fifteen months.

(d) If any case becomes two years old—regardless of its difficulty—it will be treated as a judicial emergency, unless, for good cause, an order is entered putting the case on the inactive docket.

If necessary to promote the efficient administration of justice, all hearings and trials of civil cases may be transferred from any division to any other division within the district. With the consent of the parties, the judges may conduct hearings and trials at any place within the district.

Rule 3. Filing Fee, Cost Bond, Security, Recognizance, and Prohibited Sureties.

A. Filing Fee and Cost Bond. In every civil action commenced in or removed to this court there shall be filed at the time of commencing or removal a \$15.00 filing fee. In a civil case commenced in this court, no bond, or cash deposit in lieu of such bond, as security for costs shall be required except on motion. However in a removal case, a \$200.00 bond, or cash deposit in lieu of such bond, as security for costs shall be filed as required by Title 28 United States Code 1446(d).

B. Security. In both civil and criminal actions, bonds shall be allowed and taken with security, or one or more sureties, as provided by the federal statutes, the Federal Rules of Civil Procedure, and the Federal Rules of Criminal Procedure. The judges of this district may, for good cause, enter orders restricting any bonding company or surety company from being accepted as surety upon any bond in any case or matter in this district.

C. Recognizance. In criminal cases, release on personal recognizance shall be freely granted by United States Commissioners. The requirement of security will ordinarily be imposed only in the unusual and more serious cases.

D. Prohibited Sureties. Members of the Bar, administrative officers or employees of this court, the United States Marshal, his deputies or assistants, shall not act as a surety in any suit, action or proceeding pending in this court.

Rule 4. Jurors.

Ordinarily, in the interest of time, the court will conduct the examination of prospective jurors, but may permit counsel to do so. If the court conducts the examination, counsel may suggest additional questions.

When jurors for a term of court are drawn, members of the bar of this court, upon request, shall be furnished with a copy of the list. The list shall include the address of each juror. However, no juror shall be contacted, either directly or through any member of his immediate family, in an effort to secure information concerning his background.

When the jurors report for duty at a term of court, the clerk shall make available to members of the bar of this court a diagram which shows the name, address and occupation of each juror, and the seat assigned him in the box.

Rule 5. No Photographing, Televising, or Broadcasting of Court Proceedings.

The taking of photographs in the courtroom, or in the corridors immediately adjacent thereto, during the progress of judicial proceedings, or during any recess, and the transmitting or sound recording of such proceedings for broadcasting by radio or television, shall not be permitted. Proceedings other than judicial proceedings, designed and conducted as ceremonies, such as administering oaths of office to appointed officials of the court, presentation of portraits, and similar ceremonial occasions, may be photographed in or broadcast or televised from the courtroom, with the permission and under the supervision of the court.

Rule 6. Orders and Judgments Grantable by Clerk.

Pursuant to the provisions of Rule 77(c), Federal Rules of Civil Procedure, the Clerk of the court at Asheville and an authorized deputy clerk at Asheville, Charlotte, and Statesville are authorized to grant and enter the following orders and judgments without further direction by the court, but his action may be suspended, altered or rescinded by the court for cause:

(1) Consent orders for the substitution of attorneys.

(2) Consent orders extending for not more than 30 days the time within which to answer or otherwise plead, answer interrogatories submitted under Rule 33, Federal Rules of Civil Procedure, or requests for admission as provided for in Rule 36, Federal Rules of Civil Procedure. Care will be taken not to extend the time for so long as to delay unreasonably the trial. Matters in bankruptcy and those matters set forth in Rule 6(b), Federal Rules of Civil Procedure, are not included in this authorization.

Where convenience and necessity are thought to require it; e.g., unavailability of a judge, and except where an extension may delay a scheduled trial or hearing, the Clerk or deputy clerk(s) in the division in which the proceeding is pending is/are authorized to extend for not more than ten days the time within which to answer or otherwise plead, answer interrogatories submitted under Rule 33, or request for admission as provided for in Rule 36. If the other party is aggrieved, he may immediately appeal the action of the clerk's office to one of the district judges.

(3) Consent orders extending for not more than thirty days the time to file the record on appeal and to docket the appeal in the appellate court, except in criminal cases.

(4) Consent orders dismissing an action, except in bankruptcy proceedings and in causes to which Rule 23(c) and Rule 66, Federal Rules of Civil Procedure, apply.

(5) Judgments of default as provided for in Rule 55(a) and 55(b) (1), Federal Rules of Civil Procedure.

(6) Orders cancelling liability on bonds.

(7) Orders changing the time of opening and adjourning court in absence of the judge.

(8) Judgments authorized by Rule 58, Federal Rules of Civil Procedure.

Rule 7. Motion, Pre-trial and Settlement Conference.

There shall be one Motion, Pre-trial and Settlement conference — hereinafter called pre-trial conference—in every civil case, unless the parties, with the court's approval, agree not to have one. Insofar as practicable, all motions shall be heard and ruled on at this pre-trial conference. An effort will be made to simplify the issues and the possibility of settlement will be discussed, provided that any party has the right to decline to discuss settlement and insist on immediate trial. After being fully advised by counsel, the Court will dictate a pre-trial order (See Form 1 in the appendix to these rules) to accomplish the following:

(1) Make or permit to be made such changes, if any, to the pleadings as may be necessary or desirable.

(2) Rule on any motions pending and make provision for the disposition of motions that may subsequently arise.

(3) Set a termination date for the completion of all discovery procedures.

(4) Set a trial date.

(5) Require inspection of all exhibits before trial and a listing of exhibits.

(6) Avoid questions of authenticity of documents — unless authenticity is a genuine issue.

Ordinarily, only one such pre-trial conference will be held.

Except where special hearings are convened at request of counsel, the clerk's office will prepare and mail a pre-trial calendar at least ten days before the hearing date. All cases at issue will be scheduled. The calendar will disclose the time of day in fifteen minute, half-hour, and hour intervals for such conferences so as to delay and inconvenience counsel to the minimum possible extent. In the ordinary case, the pre-trial conference will not exceed thirty minutes duration. Since cases cannot be put on the trial calendar until motions have been ruled upon, and pre-trial order entered, motions for continuances of such hearings will ordinarily be denied. Although it is better for counsel in charge of the case to attend, the presence of associate or junior counsel will usually suffice and prevent unnecessary delay. Counsel need not prepare briefs in advance of a pre-trial hearing. Questions of law will be discussed at the conference and agreement reached as to necessity and scope of briefs, if any, and the time for filing same.

Rule 8. Motions in Civil Actions.

Unless made during a hearing or trial, all motions must be put in writing and shall state with particularity the grounds of the motion and shall set forth the relief or order sought.

Ordinarily, motions will be heard and determined at pre-trial conference. (Rule 7.) As to motions which arise *after* pre-trial conference, or which ought to be determined *prior* thereto, the court will ordinarily determine such motions without oral hearing upon brief written statements of reasons in support and opposition. (Rule 78, Federal Rules of Civil Procedure.) Such statements may be simply prepared in letter form. Where it is thought necessary or desirable, the court may order a hearing.

A. Conference of Attorneys with Respect to Motions and Objections Relating to Discovery. With respect to all motions and objections relating to discovery, pursuant to Rules 26 through 37, Federal Rules of Civil Procedure, counsel for each of the parties shall meet and confer in advance of any hearing in a good faith effort to narrow the areas of disagreement.

B. Motions for an Extension of Time to Perform an Act. All motions for an extension of time to perform an act required or allowed to be done within a specified time *must* show prior consultation with opposing counsel, and the views of opposing counsel with respect to the extension.

Rule 9. Opening Statements in Civil Actions.

At the commencement of the trial of civil actions, the party upon whom rests the burden of proof may state, briefly and without argument, his cause of action and the evidence by which he expects to sustain his claim. The adverse party may then state, briefly and without argument, his defense and the evidence by which he expects to sustain same. If the trial is to the jury, the opening statement shall be made immediately after the jury is empaneled. If the judge, in the course of questioning the prospective jurors, has sufficiently explained the nature of the case, the parties may elect to waive opening statements. If the trial is to the court, the opening statement shall be made immediately after the case is called for trial, and may likewise be waived. Opening statements shall be subject to such time limitations as may be imposed by the court.

Pleadings will not be read.

Rule 10. Discovery.

The importance of discovery to federal practice cannot be overemphasized. Counsel are *required* to begin such discovery procedures as will be utilized (Rules 26-37) *promptly* after the case is at issue and are encouraged to begin even before issue is joined. Counsel will *not* wait until pre-trial conference is imminent to begin discovery. Ordinarily, no more than ninety days will be allowed after issue is joined within which time to complete discovery. In the exceptionally difficult case more time may be allowed.

II. Bankruptcy Rules

Rule 11. Filing Fees.

A. Original Petition. At the time of filing the petition initiating a proceeding under the Bankruptcy Act, the filing fees, except as provided in subsection D of this rule, shall be deposited with the clerk of court as follows:

- (1) For ordinary bankruptcy of an individual or a corporation, \$50.00. In partnership cases, \$50.00 for each partner and \$50.00 for the partnership.
- (2) For an arrangement under Chapter XI, \$50.00.
- (3) For a real property arrangement under Chapter XII, \$50.00.
- (4) For corporate reorganization under Chapter X, \$120.00, if no bankruptcy proceeding. Otherwise, \$70.00.
- (5) Railroad reorganization, under Chapter XV, \$150.00.
- (6) For composition of local taxing agency under Chapter IX, \$100.00.
- (7) For wage earner plan under Chapter XIII, \$15.00.

B. Petition to Reopen Cases To reopen any closed bankruptcy proceeding there should be a deposit with the clerk of court of the sum of \$50.00.

C. Ancillary Proceedings. For ancillary proceedings there should be a deposit with the clerk of court of the sum of \$40.00.

D. Petitions in Pending Cases. The filing fees for petitions in pending cases are as follows:

- (1) Petition to reclaim property from a bankrupt estate, \$10.00.
- (2) Petition to review an order of the referee, \$10.00.
- (3) Objections to the discharge, \$10.00.

Comment: Filing fees for petitions filed with the referee shall accompany the petitions when filed with checks payable to the clerk of court.

E. Changes. If any of the above filing fees are changed by the Judicial Confer-

ence of the United States, they shall be considered as automatic changes in this rule to conform to the new fees adopted by the said Conference.

Rule 12. Filing Original Petitions, Schedules, and Statement of Affairs.

A. Number of Copies and Place to File. In bankruptcy petitions under Chapters I through VII of the Bankruptcy Act (ordinary bankruptcy), the schedule of assets and liabilities and the statement of affairs shall be filed in triplicate originals with each of the three originals duly executed by the bankrupt and filed with the clerk of the court. In involuntary bankruptcy proceedings, the bankrupt should file with the referee within five days after adjudication the schedule of assets and liabilities and statement of affairs as required in Section 7 of the Bankruptcy Act.

Comment: Among the official forms adopted by the United States Supreme Court which have become a part of the Bankruptcy Act as found in the United States Code, are Form No. 1 which constitutes the petition and schedule of assets and liabilities, and Form No. 2 which constitutes the statement of affairs. Official Form No. 5 constitutes the petition for an involuntary proceeding. These forms, except the involuntary form, are commercially printed and distributed rather widely and may be obtained from local legal supply houses. Kale-Lawing Company, South Tryon Street, Charlotte, North Carolina, and Pound and Moore Company, South Tryon Street, Charlotte, North Carolina, and Hoyle Office Supply Company, 21 North Market Street, Asheville, North Carolina, have agreed to carry for sale such forms at all times and to mail or deliver them to lawyers immediately upon request. Proof of claim forms are also available at the same sources. For larger quantities, more economical prices can be obtained by ordering direct from printer such as Tuttle Law Print, Inc., Rutland, Vermont.

B. Full Name and Trade Names. The bankrupt's full name shall be set out in the petition. In voluntary bankruptcy proceedings, all assumed, fictitious or trade names and any other names or designations by or under which the bankrupt has been known or has conducted any business within six years next preceding the filing of the petition in bankruptcy shall be set forth in the petition. In involuntary proceedings, such facts shall be set forth in the petition to the best knowledge, information and belief of the petitioning creditors. In all cases, such facts shall be set forth in the notices to the creditors of the first meeting of creditors.

C. Listing Creditors. The list of creditors in the schedule of assets and liabilities should be accurate and complete. The street number, city and state should be listed after each creditor with sufficient accuracy to assure mail delivery.

Comment: An inadequate or incomplete mailing address may result in the bankrupt not being discharged of that indebtedness because of insufficient notice to the creditor.

D. Inability to Pay Filing Fee. A petition in a voluntary proceeding under Chapters I through VII or Chapter XIII of the Bankruptcy Act may be accepted for filing by the clerk of court if accompanied by a verified petition by the bankrupt stating that the petitioner is without and cannot obtain the money with which to pay the filing fee in full at the time of filing, accompanied by an affidavit of the petitioner's attorney that the attorney has not and will not accept any compensation for his services as such attorney until such filing fee is paid in full. The bankrupt's petition shall state the facts showing necessity for payment of the filing fee in installments and shall set forth the times upon which the bankrupt proposes to pay such fees. No discharge shall be granted until the filing fee is paid in full.

Comment: The limitations and provisions in respect to the installments as well as the facts that the proceeding may be dismissed on failure to pay the costs is contained in General Order No. 35.

E. Partnerships. Where a petition in bankruptcy involves a partnership, the petition should clearly indicate whether the individual partners are included among the bankrupts with the partnership and whether the partners are to be adjudged

bankrupts individually along with the partnership. There shall be separate adjudications for each individual and for the partnership. Whether the partners are adjudicated individually or not, the schedule of assets and liabilities should contain a separate list of the assets and liabilities of each partner.

Comment: The discharge of a partnership shall not discharge the individual partners thereof from the partnership debts. Therefore, it is most important to the partners that the petition and the adjudication include the partners. As to the treatment of the partnership and the partners in bankruptcy, see Section 5 of the Bankruptcy Act.

F. Personal Property Exemptions. The \$500.00 personal property exemption of the bankrupt as recognized under the laws of the State of North Carolina should be claimed by the bankrupt in the schedule of assets and liabilities. If the bankrupt does not claim the exempt property, the failure to do so will be considered a waiver of his rights to the said exemption. It will be sufficient to protect such rights to claim the \$500.00 exemption without identifying the particular property to be included in the allotment.

G. Estates by the Entirety. When one spouse is adjudicated a bankrupt, real estate held by the entirety is not an asset of the bankrupt estate. However, the schedule of assets and liabilities as filed by the bankrupt should indicate what property is held by the entirety, giving the approximate date of purchase, the present value and the location of the property. The value of said property would not be listed in the total value of the bankrupt estate.

H. Life Insurance Exemption. The cash surrender value of life insurance of the bankrupt is exempt if the bankrupt's wife or children are designated beneficiaries. However, the name of the insurance company, policy number, date of issuance and name of the beneficiary as well as the face amount of the policy, should be listed in the schedule of assets and liabilities by the bankrupt. The value of the policy should not be included with the total assets of the estate. The trustee in allotting the exemptions of the bankrupt should allot such life insurance by name of company, number of policy, etc., as indicated in the schedule of assets and liabilities.

Rule 13. Employment of Attorneys.

A receiver or trustee shall not employ an attorney except as provided in General Order No. 44.

Rule 14. Compensation of Attorneys.

A. Petition for Fees. An attorney for a receiver, trustee, petitioning creditors, bankrupt or debtor shall be allowed compensation only for services necessarily and actually rendered and expenses necessarily and actually incurred and paid. An attorney entitled to compensation for services shall file with the referee his petition setting forth the value and extent of the services rendered in detail indicating the amount requested and what amount, if any, has heretofore been paid to him.

B. Division of Fees. The petition by an attorney for attorney's fee shall be accompanied by his affidavit stating whether an agreement or understanding existed between the attorney and any other person for a division of the compensation, and if so the nature and the particulars thereof. The affidavit shall state that no division of fees will be made except as indicated therein. Such statement may be incorporated in the petition provided the petition is under oath.

Comment: If the division is with attorney's law partner, such should be indicated. However, the manner or percentage of division is not required to be disclosed. The restrictions on divisions of fees are contained in Section 62(c) of the Bankruptcy Act. For a suggested form for the affidavit, see Form No. 3 in the Appendix to these rules.

C. Fixing Fees. In fixing compensation of an attorney, the following factors shall be taken into consideration:

- (1) Amount of work done.
- (2) Length of time employed.
- (3) Difficulties or intricacies of the bankruptcy proceeding.
- (4) Results accomplished.
- (5) Amount involved in connection with services rendered.
- (6) Size of the estate.
- (7) The skill required and experience of counsel in similar cases.
- (8) Contingency or uncertainty of compensation.

D. North Carolina Bar Association Rates. When computing compensation on the basis of time and depending on the importance of the case, the referee may consider the recommended minimum fee schedule of the North Carolina Bar Association.

Rule 15. Petitions, Orders and Pleadings After Reference.

A. Filed With Referee. After a proceeding has been referred to the referee all petitions, pleadings and applications for orders within the referee's jurisdiction shall be made to the referee and filed with the referee.

B. Verification. (1) Required to be verified are petitions initiating the action in bankruptcy either voluntary or involuntary, statement of affairs, assets and liabilities, statement as to the division of fees as applied for by attorneys, trustee and receiver, and all reports by receiver and trustee in which there is an accounting of funds or reporting the expenses to be paid from the estate and power of attorney.

(2) Not required to be verified or under oath are all pleadings, petitions, motions and applications in the bankruptcy proceeding except as noted above.

Comment: The official caption and verification in bankruptcy proceedings is set forth in Form No. 2, Appendix to these rules.

C. Service on Trustee. Any person filing a petition to reclaim property or for the release of any rights to property, shall serve a copy of such petition on the trustee or his attorney by mailing the same to him and attaching a statement of such service to the petition as filed with the referee.

D. Manuscript Covers. Petitions, applications and orders filed with the referee should not have manuscript covers unless such covers are necessary to protect exhibits attached.

E. Communications to Referee or Judge. Letters sent to a judge or the referee about a case must show a copy sent to the trustee and/or receiver and/or opposing counsel.

Rule 16. Petition for Discharge of Bankrupt.

A. Individual or Partnership. The adjudication of an individual or a partnership operates as an application for a discharge and no further petition is necessary.

B. Corporation. If a discharge of a corporation is desired, a petition for such discharge must be filed within six months after the adjudication.

Rule 17. Objections to Discharge.

The objection to the discharge may contain one or more specifications of the grounds of opposition to such discharge. Each specification should be numbered and reference made to the applicable subparagraph of Section 14(c) of the Bankruptcy Act. Each specification should allege the essential facts and all the elements constituting the bar to discharge and not merely allege generalities or conclusions. A specification alleged in the words of the statute alone is not sufficient except where the specification is under Section 14(c) (2) of the Bankruptcy Act for failing to keep accounts and records from which the bankrupt's financial condition and business transactions might be ascertained.

Comment: For the \$10.00 filing fee for objections to discharge, see Local Rule 11D (3). Official Form No. 44, Specifications of Objection to Discharge, is set forth as Form No. 4 in the Appendix of these rules.

Rule 18. Federal Rules of Civil Procedure.

A. Applicability. The Federal Rules of Civil Procedure shall, insofar as they are not inconsistent with the Bankruptcy Act and the General Orders, be followed as nearly as may be pursuant to General Order No. 37 under the Bankruptcy Act.

B. Pre-Trial Conferences. The pre-trial conference procedure under Rule 16, Federal Rules of Civil Procedure and Local Rule 7, shall be used by the referee to its fullest advantage. Request for a pre-trial conference may be made by any party to any matter being litigated before the referee in bankruptcy.

Comment: The purpose and scope of the pre-trial conference before the referee in involved and complicated matters will be similar and as binding on the parties as a pre-trial conference under Local Rule 7.

Rule 19. Filing Claims.

A. Form. Proof of claim should be presented on a regular proof of claim form as prescribed by the Bankruptcy Act, being Official Forms Nos. 28, 29, 30, and 31. The proof of claim should have attached to it an itemized statement of the account. If the claim is based on a note or written contract, a true copy or photostatic copy should be attached. All credits should be shown by date, character and amount within the last six months. It is not required that the claim be executed under oath, except the proof of claim should be under oath when power of attorney is included.

Comment: Commercial printers usually combine the four forms into one printed form which is used in filing claims and most frequently referred to as "Proof of Claim Form in Bankruptcy." These forms can be obtained from almost any legal supply company. See also source of supply under Local Rule 12A, comment. The Bankruptcy Act has been amended dispensing with the requirement of the claim to be under oath; however, execution of power of attorney should be under oath.

B. Where Filed. All claims should be filed with the referee. Any proof of claim received by the clerk, trustee or receiver shall immediately be forwarded to the referee for filing where all claims shall be kept as provided by General Order No. 24.

C. Time for Filing. Claims must be filed within six months after the first date set for the first meeting of creditors.

Comment: See Section 57 of the Bankruptcy Act in regard to filing claims. A claim must be filed in bankruptcy in order to participate in any dividend. A prior filing in a state receivership or other insolvency proceeding does not constitute a filing in the bankruptcy court.

Rule 20. Solicitation of Proxies and Voting.

A. Requirements for Voting by Attorneys at Law. An attorney desiring to vote more than one claim under power of attorney or proxy at any meeting of creditors may be required by the referee in his discretion to furnish information prior to such voting to include:

(1) The names and amounts of the claims he desires to vote.

(2) Whether any of the creditors' claims he desires to vote are his regular clients, and if so, their names and the approximate length of time they have been such regular clients.

(3) The name of the person from whom he received the claims of creditors who are not his regular clients and the nature of his connection with such person or association or company.

(4) Whether the claims of creditors other than his regular clients have been solicited and if so by whom.

(5) Whether the said claims will be voted in an interest other than that of general creditors.

B. Inquiry by Referee as to Solicitation of Proxies. The referee at his own in-

stance or at the request of any party in interest in the proceeding may make or permit inquiry to be made as to the solicitation of claims voted or to be voted. If upon such inquiry it appears that any claims, powers of attorney, or proxies have been solicited with the intent or purpose of voting them at any meeting or hearing in the interest of the bankrupt or in the interest other than that of general creditors, the referee shall not allow the voting of such claims under such powers of attorney or proxies. If, in the opinion of the referee, the election of the trustee or the determination of any other matter to be submitted is likely to be unfairly affected by such disallowance, the referee may adjourn the meeting and notify the creditors who executed such powers of attorney or proxies of the adjourned date of the meeting to afford them an opportunity to attend and vote or to execute new powers of attorney or proxies.

Rule 21. Appeals from Referee.

A. Petition for Review. Any person aggrieved by an order of the referee may, within 10 days after the entry of such order or within such extended time as a referee upon petition filed within such 10 day period may for cause shown, file with the referee a petition for review of such order by the court, as provided by Section 39(c) of the Bankruptcy Act.

B. Service of Petition and Brief. A copy of the petition, together with a copy of the brief as hereinafter mentioned shall be served upon the adverse parties who were represented at the hearing by mailing copies of the same to the said parties, such service being indicated by a statement filed with the petition for review. The petition for review shall set forth the order complained of and the alleged errors in respect to such order.

Comment: An unofficial form for petitions for review may be found in Collier on Bankruptcy and Remington on Bankruptcy. See Unofficial Form No. 1000 at Page 3861, Vol. 5, Collier on Bankruptcy, and Unofficial Form No. 3500 on Page 810 in the volume of Forms, Remington on Bankruptcy. There are valuable comments and suggestions under each of the forms cited. There is a \$10.00 filing fee for each petition for review as referred to in Local Rule 11D (2).

C. Briefs. Every petition for review should be accompanied by a brief in support of the alleged errors and the person filing said brief shall serve a copy thereof on the adverse parties who were represented at the hearing. Within 10 days after the referee files with the clerk his certificate for review, the opposing party shall file with the clerk and serve upon the petitioner his answering brief.

D. Hearing on Petition for Review. The referee shall furnish the clerk of court the name and address of each attorney for the interested parties having appeared in the hearing before him simultaneously with the transferral of the certificate of the referee to the court on the petition for review. Each attorney for the interested parties shall be notified by the referee of the forwarding of the certificate of review to the clerk's office. The clerk upon receipt of the certificate and the names of the attorneys for the interested parties shall immediately make arrangements or cause to be set a hearing on the said petition for review and notify each interested party through his attorney of the date and hour of said hearing. No further notice shall be required of the hearing on the petition for review.

Rule 22. Depositories.

A. Place of Deposit. Receivers and trustees shall deposit all bankruptcy funds in the banks within the district as shall be designated as such depositories, and as directed from time to time, and all funds shall be disbursed by check and countersigned by the referee.

B. Canceled Checks and Statements. Each depository as designated shall retain the canceled checks and statements and deliver the same to the referee as and when directed. No canceled checks will be delivered by the bank to the trustee. However,

the trustee may obtain any information about his account from the bank from time to time.

C. Report by Bank. Each depository having funds on bankrupt cases will report to the referee and to the clerk of court by not later than the first day of January and the first day of July of each year the name and the amount of each bankruptcy case on deposit in the respective bank as of the first day of the preceding month. The acceptance of the account by the depository is an implied agreement to abide by and be subject to these rules in regard to deposits.

Appendix of Forms

FORM 1

(See Local Rule 7)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN
DISTRICT OF NORTH CAROLINA

..... DIVISION

-vs- Plaintiff, } Civil No.
 Defendant. } Pre-Trial Order

- 1. Unless typed in below, there are no further amendments to be made to the pleadings nor any motions which have not been ruled on.
- 2. Unless typed in below, all discovery procedures (including medical examinations) have been completed or will be completed by the day of, 1965. The case is ready for trial before the Court a jury and will be calendared for trial at the Term, 1965. The duration of trial will be approximately days.
- 3. The Court requires that counsel permit each other to inspect all exhibits *before* the trial begins. Also before the trial begins, counsel will number all exhibits and make a *list* of them, and give to the courtroom Clerk three copies of the list when the case is called for trial. Usually it is a waste of time and money to bring custodians of records and documents to court for authentication. Counsel are requested to discuss authenticity of exhibits at least one week before trial so as to allow time for the party opposing the introduction of such exhibits to determine authenticity if it is seriously contested.
- 4. At least one week before trial the Court requests that counsel for plaintiff telephone or otherwise communicate with counsel for defendant and that both counsel seriously consider at that time the possibility of any settlement agreement.

Comment: Blanks in the foregoing paragraphs are filled in at pre-trial conference. The remainder of the pre-trial order is dictated by the judge in the presence of counsel at pre-trial conference.

FORM 2 (Bankruptcy)

(See Local Rule 15)

Official Caption and Verification

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN
DISTRICT OF NORTH CAROLINA

In Bankruptcy No.

In the Matter of }
..... } PETITION
Bankrupt }

To the Honorable, Referee in Bankruptcy :

(CONTENTS OF PETITION)

.....
Petitioner

.....
Attorney for Petitioner
(As to requirement of verification see Local Rule 15B)
STATE OF
COUNTY OF

I,, the Petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

.....
Petitioner

Sworn to and subscribed before me this the day of, 19

Notary Public (or other official)

My commission expires

Form 3 (Bankruptcy)

(See Local Rule 14B)

Division of Attorneys' Fees, Affidavit

(Caption as in Form No. 2)

....., being duly sworn deposes and says: That he is a petitioner in the above bankruptcy proceedings for compensation as; that no agreement has been made directly or indirectly by him, and no understanding exists between him and any other person for a division of compensation except as follows:; and that no division of fees prohibited in Section 62(c) of the Bankruptcy Act will be made by the applicant.

.....
Applicant

(Verification)

See Form No. 2

FORM 4 (Bankruptcy)

(See Local Rule 17)

Specification of Objections to Discharge

(Caption as in Form No. 2)

....., of, in the County of, State of, the trustee of the estate (or a creditor) of the above named bankrupt (or the United States attorney for said district or the attorney designated by the Attorney General of the United States), having examined into the acts and conduct of said bankrupt and being satisfied that probable grounds exist for the denial of the discharge of said bankrupt and that the public interest so warrants, does hereby oppose the granting to said bankrupt of a discharge from his debts, and specifies the following as grounds of objection: (Here specify in separately numbered paragraphs the grounds of objection).

.....
Trustee (or creditor, etc.)

(Verification)

See Form No. 2

Appendix III. Removal of Causes

(Removal from State Courts to District Courts of the United States. Title 28, U.S. Code, §§ 1441-1450, and Rule 81(c) of Federal Rules of Civil Procedure.)

Chapter 89.

District Courts; Removal of Cases from State Courts.

Sec.	Sec.
1441. Actions removable generally.	1445. Nonremovable actions.
1442. Federal officers sued or prosecuted.	1446. Procedure for removal.
1442a. Members of armed forces sued or prosecuted.	1447. Procedure after removal generally.
1443. Civil rights cases.	1448. Process after removal.
1444. Foreclosure action against United States.	1449. State court record supplied.
	1450. Attachment or sequestration; securities.

§ 1441. Actions removable generally.

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction. (June 25, 1948, ch. 646, § 1, 62 Stat. 937.)

§ 1442. Federal officers sued or prosecuted.

(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for any act under color of office or in the performance of his duties.

(4) Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House.

(b) A personal action commenced in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States and is a nonresident of such State, wherein jurisdiction is obtained by the State court by personal service of process, may be removed by the defendant to the district court of the United States for the district and division in which the defendant was served with process. (June 25, 1948, ch. 646, § 1, 62 Stat. 938.)

§ 1442a. Members of armed forces sued or prosecuted.

A civil or criminal prosecution in a court of a State of the United States against a member of the armed forces of the United States on account of an act done under color of his office or status, or in respect to which he claims any right, title, or authority under a law of the United States respecting the armed forces thereof, or under the law of war, may at any time before the trial or final hearing thereof be removed for trial into the district court of the United States for the district where it is pending in the manner prescribed by law, and it shall thereupon be entered on the docket of the district court, which shall proceed as if the cause had been originally commenced therein and shall have full power to hear and determine the cause. (Added Aug. 10, 1956, ch. 1041, § 19 (a), 70A Stat. 626.)

§ 1443. Civil rights cases.

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law. (June 25, 1948, ch. 646, § 1, 62 Stat. 938.)

§ 1444. Foreclosure action against United States.

Any action brought under section 2410 of this title against the United States in any State court may be removed by the United States to the district court of the United States for the district and division in which the action is pending. (June 25, 1948, ch. 646, § 1, 62 Stat. 938; May 24, 1949, ch. 139, § 82, 63 Stat. 101.)

§ 1445. Nonremovable actions.

(a) A civil action in any State court against a railroad or its receivers or trustees, arising under sections 51-60 of Title 45, may not be removed to any district court of the United States.

(b) A civil action in any State court against a common carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments, arising under section 20 of Title 49, may not be removed to any district court of the United States unless the matter in controversy exceeds \$3,000, exclusive of interest and costs.

(c) A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States. (June 25, 1948, ch. 646, § 1, 62 Stat. 939; July 25, 1958, Pub. L. 85-554, § 5, 72 Stat. 415.)

§ 1446. Procedure for removal.

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States

for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitled him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

(b) The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

(c) The petition for removal of a criminal prosecution may be filed at any time before trial.

(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

(e) Promptly after the filing of such petition and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(f) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court. (June 25, 1948, ch. 646, § 1, 62 Stat. 939; May 24, 1949, ch. 139, § 83, 63 Stat. 101; September 29, 1965, Pub. L. 89-215, 79 Stat. 887.)

§ 1447. Procedure after removal generally.

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise. (June 25, 1948, ch. 646, § 1, 61 Stat. 939; May 24, 1949, ch. 139, § 84, 63 Stat. 102; July 2, 1964, Pub. L. 88-352, Title IX, § 901, 78 Stat. 266.)

§ 1448. Process after removal.

In all cases removed from any State court to any district court of the United States in which any one or more of the defendants has not been served with

process or in which the service has not been perfected prior to removal, or in which process served proves to be defective, such process or service may be completed or new process issued in the same manner as in cases originally filed in such district court.

This section shall not deprive any defendant upon whom process is served after removal of his right to move to remand the case. (June 25, 1948, ch. 646, § 1, 62 Stat. 940.)

§ 1449. State court record supplied.

Where a party is entitled to copies of the records and proceedings in any suit or prosecution in a State court, to be used in any district court of the United States, and the clerk of such State court, upon demand, and the payment or tender of the legal fees, fails to deliver certified copies, the district court may, on affidavit reciting such facts, direct such record to be supplied by affidavit or otherwise. Thereupon such proceedings, trial, and judgment may be had in such district court, and all such process awarded, as if certified copies had been filed in the district court. (June 25, 1948, ch. 646, § 1, 62 Stat. 940; May 24, 1949, ch. 139, § 85, 63 Stat. 102.)

§ 1450. Attachment or sequestration; securities.

Whenever any action is removed from a State court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant in such action in the State court shall hold the goods or estate to answer the final judgment or decree in the same manner as they would have been held to answer final judgment or decree had it been rendered by the State court.

All bonds, undertakings, or security given by either party in such action prior to its removal shall remain valid and effectual notwithstanding such removal.

All injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court. (June 25, 1948, ch. 646, § 1, 62 Stat. 940.)

Federal Rules of Civil Procedure

Rule 81. Applicability in general.

(c) Removed Actions.

These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, he shall answer or present the other defenses or objections available to him under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest. If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if his demand therefor is served within 10 days after the petition for removal is filed if he is the petitioner, or if he is not the petitioner within 10 days after service on him of the notice of filing the petition. A party who, prior to removal, has made an express demand for trial by jury in accordance with state law, need not make a demand after removal. If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury. The court may make this direction on its own motion and shall do so as a matter of course at the request of any party. The failure of a party to make demand as directed constitutes a waiver by him of trial by jury.

Appendix IV. Authentication of Records

(Title 28, U.S. Code, §§ 1738-1741, and Rule 44 of Federal Rules of Civil Procedure.)

§ 1738. State and Territorial statutes and judicial proceedings; full faith and credit.

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. (June 25, 1948, ch. 646, § 1, 62 Stat. 947.)

§ 1739. State and Territorial nonjudicial records; full faith and credit.

All nonjudicial records or books kept in any public office of any State, Territory, or Possession of the United States, or copies thereof, shall be proved or admitted in any court or office in any other State, Territory, or Possession by the attestation of the custodian of such records or books, and the seal of his office annexed, if there be a seal, together with a certificate of a judge of a court of record of the county, parish, or district in which such office may be kept, or of the Governor, or secretary of state, the chancellor or keeper of the great seal, of the State, Territory, or Possession that the said attestation is in due form and by the proper officers.

If the certificate is given by a judge, it shall be further authenticated by the clerk or prothonotary of the court, who shall certify, under his hand and the seal of his office, that such judge is duly commissioned and qualified: or, if given by such Governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the State, Territory, or Possession in which it is made.

Such records or books, or copies thereof, so authenticated, shall have the same full faith and credit in every court and office within the United States and its Territories and Possessions as they have by law or usage in the courts or offices of the State, Territory, or Possession from which they are taken. (June 25, 1948, c. 646, § 1, 62 Stat. 947.)

§ 1740. Copies of consular papers.

Copies of all official documents and papers in the office of any consul or vice consul of the United States, and of all official entries in the books or records of any such office, authenticated by the consul or vice consul, shall be admissible equally with the originals. (June 25, 1948, ch. 646, § 1, 62 Stat. 947.)

§ 1741. Foreign official documents.

An official record or document of a foreign country may be evidenced by a copy, summary, or excerpt authenticated as provided in the Federal Rules of Civil Pro-

cedure. (June 25, 1948, ch. 646, § 1, 62 Stat. 948; May 24, 1949, ch. 139, § 92 (b), 63 Stat. 103; Oct. 3, 1964, Pub. L. 88-619, § 5 (a), 78 Stat. 996.)

Federal Rules of Civil Procedure

Rule 44. Proof of official record.

(a) Authentication.

(1) *Domestic.* An official record kept within the United States, or any state, district, commonwealth, territory, or insular possession thereof, or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office.

(2) *Foreign.* A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification.

(b) Lack of Record.

A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a) (1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a) (2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.

(c) Other Proof.

This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law.

Appendix V. Extradition

(The following publication, "Application for Requisitions for Fugitives from Justice: Requirements and Forms to Be Observed and Followed," was issued by the Governor's Office in 1968.)

Introduction.

The rules and forms included in this publication have been prepared for the use of solicitors and other officials who have occasion to apply to the Governor of North Carolina, asking that he make requisition upon the governor of another state for the extradition of fugitives from justice and other persons subject to extradition.

The application for requisition and accompanying papers filed with this office must be in substantial conformity with these rules and forms; otherwise the requested requisition will not be issued.

While the requirements set forth herein will be found to be more detailed and extensive than those of the Uniform Extradition Act, it has been found from experience that some states are very particular in the requirements which they think should be met before a requisition for extradition will be honored. These rules and forms have accordingly been drawn to satisfy the requirements of the most demanding states, in order that there may be no risk of a refusal by another state to grant extradition to North Carolina on the ground of some technical deficiency in the papers accompanying the Governor's requisition.

Where the application for requisition and the accompanying papers are found by this office to be in order and the Governor deems the case a proper one for extradition, this office will prepare and the Governor will issue (1) a requisition upon the governor of the asylum state, asking that the subject be delivered into the custody of the agent of this state in order that he may be brought to North Carolina, and (2) an agent's commission, authorizing the extradition agent to go to the asylum state, receive custody of the subject, bring him to North Carolina, and deliver him to the proper authorities in this state.

United States Statutes Concerning Requisitions for Fugitives from Justice.

Title 18, United States Code Annotated, Sec. 3182. Fugitives from State or Territory.—Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged.

APPENDIX V—EXTRADITION

1. Where subject is wanted for trial.
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 - b. Supporting documents.
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 - VII. Forms to be followed for return of escaped prisoners.
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Rules Concerning Applications For Requisition.

1. **Where subject is wanted for trial:** In requesting the extradition of a fugitive from justice (or other person subject to extradition) from another state to North Carolina for trial, the following documents must be transmitted to the Governor of North Carolina:

a. **Application:** Application for requisition, made by the solicitor for the solicitorial district wherein the offense was allegedly committed. The application and supporting documents must be submitted in quadruplicate. The following must appear by the solicitor's application for requisition of a person wanted for trial in North Carolina:¹

- (1) The full name of the subject for whom extradition is asked, properly spelled, in Roman capital letters, for example: JOHN DOE.
- (2) That in his opinion the ends of public justice require that the subject be brought to this state for trial.
- (3) That he believes that he has sufficient information to secure the conviction of the subject.
- (4) The *name* and *address* of the agent proposed to receive custody of the subject and escort him to North Carolina, and that the person recommended is a proper person and has no private interest in the arrest and conviction of the subject.
- (5) If there has been any former application for a requisition for the same person growing out of the same transaction, it must be so stated, with an explanation of the reason for the present request, together with the date of such prior application as near as may be.
- (6) If the subject is known to be under either civil or criminal arrest in the state or territory in which he is alleged to be, the fact of such arrest and the nature of the proceedings on which it is based, the place where he is in custody, and the name of the officer who has custody of him, must be stated, if known.
- (7) That the application is not made for the purpose of enforcing the collection of a debt, or for any private purpose whatever, and

1. Appropriate modifications should be made where subject has escaped from custody after trial or has violated the terms of his bail or probation. See Sections 2 and 3, and the forms printed in the Appendix to these rules.

that if the requisition applied for be granted, the criminal proceeding will not be used for any of said objects.

- (8) The nature of the crime charged (with a reference where practicable to the particular statute defining and punishing the same), and the approximate time, place, and circumstances of its occurrence. If the subject was in North Carolina at the time the crime was allegedly committed and has since fled the State, that fact must be stated. If, on the other hand, the subject committed an act while in another state which intentionally resulted in a crime in North Carolina and is now in the state upon which requisition is asked, that fact must likewise be stated.
- (9) If the offense charged is not of recent occurrence, a satisfactory reason must be given for the delay in making the application.

The application must be verified by the officer who makes it before the clerk of the superior court of the county wherein the crime allegedly occurred or the subject escaped confinement or violated the terms of his probation or bail. To this verification must be attached the certificate of the clerk of court as to the official character of the solicitor or other officer making the application, the certificate of a judge of superior court as to the official character of the clerk, and the certificate of the clerk as to the official character of the judge. (The certificates of the clerk and that of the judge may be combined with their certificates as to other matters in connection with the supporting documents. See Appendix V).²

b. Supporting documents: Four certified copies of (1) the indictment returned, or (2) the complaint or affidavit made before a judge or magistrate, stating the offense with which the subject is charged, together with four certified copies of any warrant³ which was issued thereon, must be attached to the application. A *capias* alone will *not* suffice. Where a warrant accompanies the application, the official character of the official who took the affidavit or complaint and issued the warrant must be certified by the clerk of the superior court of the county wherein the crime allegedly occurred.

The official character of the clerk must be certified by a judge of the superior court, and the official character of the judge must be certified by the clerk.

The authenticity of the copies of the indictment or of the complaint or affidavit and warrant must be certified by the clerk having custody of the original records; or in the case of a complaint or affidavit and warrant, it may be certified by the judge or magistrate who took the complaint or affidavit and issued the warrant. The official character of the magistrate or judge must be certified by the clerk of superior court, that of the clerk by the judge, and that of the judge by the clerk.

Where the supporting document is a complaint or affidavit made before a judge or magistrate, the warrant must be filled out and directed to a *North Carolina* officer, even if the subject is known to be in another state. The judge or magistrate issuing the warrant has no authority to order an arrest to be made by an officer of another state, and where the warrant is directed to an officer outside of North Carolina, the asylum state may refuse to honor the accompanying requisition of the Governor of North Carolina.

The indictment or the affidavit or complaint made before the magistrate must substantially charge the person demanded with having committed a crime under the laws of North Carolina.

² While the Uniform Extradition Act requires no certification of the application for requisition beyond the verification by the solicitor, it is considered advisable to attach the clerk's and judge's certificates because some states refuse to honor a requisition when these certificates are not attached to the application for requisition.

³ Note that a clerk of superior court *cannot* issue a warrant charging a crime triable in Superior Court unless he is also clerk of a recorder's court and issues the warrant in his capacity as clerk of recorder's court.

c. **Special affidavits:** In all cases of fraud, false pretense, embezzlement, or forgery, when made a crime by the common law or any penal code or statute, there must be included the affidavit of the principal complaining witness or informant (1) that the application is made in good faith, for the sole purpose of punishing the accused, and (2) that he does not desire or expect to use the prosecution for the purpose of collecting a debt or for any private purpose, and will not directly or indirectly use the same for any of said purposes, or a sufficient reason must be given for the absence of such affidavit.

d. **Additional affidavits:** The solicitor may attach to his application for requisition such additional affidavits as he may think necessary; such as, affidavits from any persons who are familiar with the details of the crime and who can thus corroborate the allegations made in the complaint or indictment.

e. In addition to the foregoing, *certain additional items* often prove of aid in securing extradition, and may well be included with the application. Among these items are the following:

- (1) A photograph of the fugitive. This will be of special aid in connection with the identification feature hereinafter discussed. With the photograph should be an affidavit to the effect that the person there depicted is the one who is charged with the crime.
- (2) A sworn statement, which may well form a part of the county or solicitor's application, to the effect that the fugitive was physically present in the demanding State at the time of the commission of the crime. This is important because many states refuse extradition in cases like conspiracy, desertion or nonsupport where the offender was not physically present in the state wherein the crime is charged.
- (3) A copy of the criminal statute under which the accused is charged. This affords the Governor of the asylum state easy reference to the statute involved and allows him to see whether or not the indictment or complaint substantially charges a violation of such statute.

2. **Where subject escapes custody:** Where it is necessary to extradite a person who has been convicted of any crime and has thereafter escaped to another state, the application for requisition may be made by the solicitor or by the jailer, sheriff, parole board, warden, or other officer; for example, the Commissioner of Correction, from whose custody the subject escaped. The application in such case shall be accompanied by four certified copies of each of (a) the indictment (or the warrant, if the subject was tried on the warrant), (b) the judgment of conviction and sentence upon which the person was being held at the time of his escape, and (c) the affidavit of the officer from whose custody he escaped, showing such escape and the circumstances attending the same. The authenticity of the indictment (or warrant) and the record of conviction and sentence upon which the person is being held must be certified by the clerk having custody of the original records, and the character of the official making affidavit as to the subject's escape must be certified by the clerk of superior court. The official character of the certifying clerk must be certified by a judge of superior court, and that of the judge by the clerk.

3. **Probationers:** Where it is necessary to bring back to North Carolina a person on probation who has violated the terms of his probation and left the State, the application for requisition and accompanying papers may be prepared by the State Probation Commission and forwarded to the solicitor of the district which embraces the county wherein the subject was serving his probation, or they may be prepared by the solicitor himself if he prefers.

4. **Naval or Marine Personnel:** Where it is desired to requisition a person who is on active duty with the Navy or Marine Corps, it is necessary that the

APPENDIX V—EXTRADITION

requisition also be accompanied by an agreement by proper authorities (a) that the commanding officer of the subject will be informed of the outcome of any trial, and (b) that if the Naval or Marine authorities desire his return, the subject will, on acquittal or completion of sentence, (1) be returned to the Naval or Marine authorities at the place of delivery, or (2) be issued transportation to the nearest receiving ship, station, or barracks at the expense of the authority asking requisition. In all cases where the costs and expenses incident to requisition would be borne by the county i.e., where the crime charged is a misdemeanor *or* where no requisition is issued, the solicitor or other officer making application for requisition must prepare and execute an agreement to this effect. If the crime is a felony *and* a requisition is issued by the Governor's office, then the agreement will be prepared and executed by the Governor. The agreement may take the form of a letter to the Secretary of the Navy, setting out the required promises. The requisition and the Governor's papers are mailed to the Secretary of the Navy by the Governor's Office.

Army Personnel: When it is desired to requisition a person who is on active duty with the Army, an agreement is *not* necessary. The solicitor sends his papers to the office of the Governor, who in turn processes the papers and addresses his endorsement to the Secretary of the Army, and mails the papers to the Secretary of the Army, Attention: Judge Advocate General, Washington, D.C.

Fugitives out of the United States: The solicitor sends his demand to the Governor's Office. It is processed, the Governor's endorsement added, addressing it to the Secretary of State, and mailed to the Secretary of State, Washington, D.C.

Fugitives from Justice in Possessions: The solicitor sends his demand to the Governor's Office. It is processed, the Governor's endorsement added, addressing it to the Governor of the Possession, and mailed to the Governor of the Possession direct.

Fugitives in the District of Columbia: The solicitor sends his demand to the office of the Governor, who in turn processes the papers, addresses his endorsement to the Chief Judge of the U.S. District Court, and mails the papers to the Chief Judge of the U.S. District Court, Washington, D.C.

5. Renewal of application: Upon renewal of an application (for example, where prior requisition has proved ineffective because the subject was not to be found in the state upon which requisition was made), new or re-certified copies of papers in conformity with these rules must be furnished.

6. Nonsupport cases: Solicitors are requested not to send papers to the Governor for charges of nonsupport unless the Uniform Reciprocal Enforcement of Support Act (G.S. 52A-1 et seq.) has been used unsuccessfully. If it has, an affidavit to this effect should be attached to each set of papers. There are always exceptions to the rule, however; and if the solicitor feels that he has a good enough case, he can present it. In cases where a man has been sentenced for nonsupport and escapes before he serves the sentence, usually the solicitor goes ahead and sends his demand to the Governor, who considers it favorably. In cases where a man violates probation in connection with nonsupport, the solicitor should feel free to go ahead and send his papers to the Governor. In any case involving nonsupport where a court of competent jurisdiction has been used without effect, the Governor would normally consider a request in such case favorably.

7. Additional agents: When it is deemed necessary for more than one extradition agent to be designated to escort a subject from another state to this State in a case of felony, the solicitor or other officer making application must file with his written application for requisition an affidavit setting forth in detail

the reasons why it is necessary to have more than one extradition agent so designated. Among other things (but not by way of limitation), the affidavit must set forth whether or not the subject is a dangerous person, his previous criminal record (if any), and any record of the subject on file with the Federal Bureau of Investigation or with the prison authorities of this State. As a further reason for more than one extradition agent to be designated, it may be shown in the affidavit the number of subjects to be brought to this State. If the Governor finds from his own investigation and from the information made available to him that more than one extradition agent is necessary, he may designate more than one extradition agent for the purpose. *If the fugitive is a female, one of the two agents must be a female, if two are sent; if one is sent, she must be a female.*

8. Agent must await notice: The agent or agents named in the requisition should not go to the state on which demand is made until action has been taken by the governor of that state and the agent is so notified by the office of the Governor of North Carolina or proper authorities of the state on which the demand is being made. The State of North Carolina will *not* be liable for any expenses incurred by the agent or agents in the way of travel and subsistence costs prior to the date action is taken by the governor of the state on which the demand is made.

9. Return of commission: Immediately after the agent has completed his assignment by delivering the subject to the proper officer in North Carolina, he must make return on the form printed on the back of his commission, and must have the officer into whose custody the subject was delivered fill in and sign the accompanying receipt. If the subject is not taken into custody and brought back to North Carolina by the agent, he must make return of that fact and the reasons therefor on the back of his commission. The agent's commission must be returned to the Governor's Office with proper return made thereon before the agent will be reimbursed by this office for his expenses.

10. Costs and expenses:

a. When State pays: If the crime charged against the subject is a felony and requisition is issued by the Governor of North Carolina, reimbursement for expenses incurred in bringing the subject to this State will be made out of the State Treasury on certificate of the Governor and warrant of the State of North Carolina, signed by the State Disbursing Officer.

The State will also be responsible for expenses incurred in the return of fugitives charged with felonies if the extradition process is not used. If the Governor's requisition is issued but thereafter extradition is waived by the subject, a copy of the waiver should be sent to this office, together with the agent's commission attached to the expense account, and the State will pay the expenses.

The circumstances under which the Governor's Office will pay the expenses of felons returned to North Carolina without the extradition process are as follows:

- (1) A law-enforcement agency in the cities or counties of North Carolina must first contact the Governor's Office for permission to go for the fugitive and permission to send *two agents if necessary*, instead of the usual one agent. The Governor's Office will pay the expenses of one agent at all times if the expense account is in order, but for *two* only if necessary and permission granted.
- (2) The Governor's Office will pay for *one trip* only to return the fugitive to North Carolina, except in extreme cases where a second trip is necessary.
- (3) The agent must attach a copy of the waiver of extradition by the felon to each copy of the expense account.
- (4) The agent must provide proof that he returned the fugitive; and this

APPENDIX V—EXTRADITION

could be in the form of an affidavit or a form provided by the office of the law-enforcement agency.

b. When county pays: In all other cases (i.e., where the crime charged is a misdemeanor), reimbursement will be made out of the treasury of the county wherein the crime is alleged to have been committed, according to such regulations as the board of county commissioners of that county may promulgate.

c. Expenses allowed: If the extradition agent or agents or person or persons designated to return a fugitive or fugitives from another state to this State shall elect to travel by automobile, a sum not exceeding eight (8¢) per mile may be allowed in lieu of all travel expense, and will be paid upon a basis of mileage for the complete trip. If travel is by train, bus, or other public conveyances, including use of taxis, the actual fare is allowed. This will include Pullman fare. If a county or city-owned car is used, only ordinary auto expenses, such as gas and oil, will be allowed. No expenses for witnesses are allowed. The maximum allowance by the State of North Carolina for out-of-state expenses for hotel and meals (and tips) is actual cost, not to exceed \$16.00 per day for each person, including the fugitive. Telephone calls will be paid for if necessary in connection with the State's business. In all cases, the expenses for which repayment or reimbursement may be claimed shall consist of the reasonable and necessary travel expense and subsistence costs of the extradition agent or fugitive officer, as well as the fugitive, subject to the limitations indicated above, together with such legal fees as were paid to the officials of the state on whose governor the requisition is made. North Carolina is reciprocal as far as requisition fees are concerned. The Governor's Office pays requisition fees in cases of felonies only; in cases of misdemeanors, the county is responsible for payment of requisition fees.

11. Expense accounts: Expense accounts must be submitted to the Governor's Office in triplicate. The person or persons designated to return the fugitive will not be reimbursed for any expenses in connection with any requisition or extradition proceedings unless the expenses are itemized properly on the required expense forms, and the statement thereof sworn to under oath. The agent will not be reimbursed unless the receipts for the following are attached: lodging (hotel), tolls, airplane fares, train fares or bus fares, or auto expenses. The Governor has the authority, upon investigation, to increase or decrease any item or expenses shown in the sworn statement, or to include items of expenses omitted by mistake or inadvertence. The decision of the Governor as to the correct amount to be paid for such expenses or reimbursements is final. At the time the expense account is filed, the agent must return his commission with the proper return made thereon, in order to be reimbursed by the Governor's Office for his expenses. As requested previously, the waiver of extradition must be attached, if the agent's commission is not used, to the expense account, along with the requested receipts, mentioned above. The Governor's Office submits the expense account for approval to the State Auditor in the Administration Building. Recommended copy of travel expense form to be used is shown under *Appendix VIII. Miscellaneous Forms*. These forms can be obtained from the State Budget Officer, Administration Bldg., Raleigh, N.C., or the law-enforcement agencies can have some printed in their own locality.

Appendix I.

Uniform Criminal Extradition Law.

Prior to 1937 the Executive Department in this State established rules for the extradition of criminals; but in that year the General Assembly enacted a uniform extradition law which made unnecessary all rules by executive order. The following forty-five (45) states have also adopted the Uniform Extradition Act:

Alabama	Kansas	North Carolina
Alaska	Kentucky	Ohio
Arkansas	Maine	Oklahoma
Arizona	Maryland	Oregon
California	Massachusetts	Pennsylvania
Colorado	Michigan	Rhode Island
Connecticut	Minnesota	South Dakota
Delaware	Missouri	Tennessee
Florida	Montana	Texas
Georgia	Nebraska	Utah
Hawaii	Nevada	Vermont
Idaho	New Hampshire	Virginia
Illinois	New Jersey	West Virginia
Indiana	New Mexico	Wisconsin
Iowa	New York	Wyoming

The possessions, Puerto Rico, the Panama Canal Zone, and the Virgin Islands have also adopted the act.

The following have *not* adopted the Uniform Criminal Extradition Act:

D.C.	North Dakota	Washington
Louisiana	South Carolina	Guam (Possession)
Mississippi		

Appendix II.

Uniform Reciprocal Enforcement of Support Act.

As amended in 1952.

All of the States have adopted this act

The asterisk (*) shown by some of the states means that this particular state will *not* honor a requisition for nonsupport in most cases unless this act has first been used unsuccessfully, and so stated in the papers submitted. It is the general opinion at the present time that the majority of the states feel the same way; those with the asterisk put their views in writing to the states.

Alabama	*Kentucky	North Dakota
Alaska	Louisiana	*Ohio
Arizona	Maine	Oklahoma
*Arkansas	Maryland	Oregon
*California	Massachusetts	*Pennsylvania
Colorado	*Michigan	Puerto Rico (Possession)
Connecticut	Minnesota	Rhode Island
*Delaware	Mississippi	South Carolina
Florida	*Missouri	South Dakota
Georgia	Montana	Tennessee
Guam (Possession)	Nebraska	Texas
Hawaii	Nevada	Utah
*Idaho	New Hampshire	Vermont
Illinois	*New Jersey	*Virginia
Iowa	*New Mexico	*West Virginia
Indiana	New York	Wyoming
*Kansas	*North Carolina	

APPENDIX V—EXTRADITION

Appendix III.

Table of States where the Uniform States Interstate Agreement on Detainers has been adopted.

G.S. 148-89 to 148-95

California	New Hampshire
Connecticut	New Jersey
Hawaii	New York
Iowa	North Carolina
Maryland	Pennsylvania
Massachusetts	Rhode Island
Michigan	South Carolina
Minnesota	Utah
Montana	Vermont
Nebraska	Washington

Appendix IV.

Extradition Fees Required by Various States.

Alabama	None	Nebraska	None
Alaska	None	Nevada	None
Arizona	None	New Hampshire	None
Arkansas	None	New Jersey	None
California	None	New Mexico	\$3.00
*Colorado	\$5.00	New York	None
Connecticut	None	***North Carolina	Reciprocal
Delaware	None	North Dakota	\$3.00
Florida	None	Ohio	None
Georgia	None	Oklahoma	\$2.50
Hawaii	None	Oregon	None
Idaho	None	Pennsylvania	None
Illinois	None	Rhode Island	None
Indiana	None	South Carolina	None
Iowa	None	South Dakota	\$3.00
**Kansas	\$5.00	Tennessee	None
Kentucky	\$4.00	Texas	None
Louisiana	None	Utah	None
Maine	None	Vermont	None
Maryland	None	Virginia	None
Massachusetts	None	Washington	None
***Michigan	Reciprocal	West Virginia	\$2.00
Minnesota	None	Wisconsin	None
Mississippi	None	*Wyoming	\$5.00
Missouri	\$2.50	Philippine Islands	None
Montana	\$5.00	Puerto Rico	None

Appendix V.

Forms To Be Followed Where No Indictment Has Been Found.

[Application and accompanying papers must be submitted in quadruplicate.]

STATE OF NORTH CAROLINA

APPLICATION FOR REQUISITION

COUNTY OF

* Make check out to Secretary of State.

** Make check out to the Governor or Secretary of State.

*** The word *Reciprocal* means that if a state charges an extradition fee, the state being dealt with will charge a fee.

APPENDIX V—EXTRADITION

....., Solicitor of the
Solicitorial District of North Carolina, N.C., hereby makes
this verified application for the requisition of,
and in support of such application, the said Solicitor hereby shows the following
facts:

1. That the name of the person for whom requisition is asked is
2. That in his opinion, the ends of public justice require that the subject be arrested and brought to the State of North Carolina for trial at the public expense.
3. That he believes that he has sufficient evidence to secure the conviction of the subject.
4. That the name of the agent proposed to receive the subject from the proper authorities of the State of and bring him to the State of North Carolina for trial is; and that the person named as agent is a proper person and that he has no private interest in the arrest and conviction of the subject.
5. That there has been no former request for the requisition of the subject growing out of the same transaction herein alleged.

[Note: If there has been any former application for requisition of the same person growing out of the same transaction, it must be so stated, together with the date of such prior application(s) as near as may be, and with an explanation of the reasons for the present request.]

6. That the subject is now in the State of, and in the custody of

7. That this application is not made for the purpose of collecting a debt or enforcing a private claim, or for any private purpose whatever, and that if the requisition applied for be granted, the criminal proceedings will not be used for any of said objects.

8. That the extradition of the subject to the State of North Carolina is hereby requested for the purpose of trial on the charge of committing the crime of
....., as set forth in the warrant heretofore issued against him as per quadruplicate copies hereto attached. [That the alleged crime was committed in, North Carolina on or about the day of, 19....; and that the subject was present in, North Carolina, at the time of the commission of the alleged crime, and thereafter the subject fled from the State of North Carolina.]*

9. That this application was made as soon as the subject could be located.

10. That this application is verified by, Solicitor as aforesaid, and is executed in quadruplicate and is accompanied by certified copies of the warrant heretofore issued against the said subject by
....., a duly appointed, qualified, and acting
Verified this the day of, 19....

.....
Solicitor

of the
Solicitorial District of
North Carolina.

* If requisition is sought under G.S. 15-60, a statement in the following form should be substituted for the bracketed sentence above: "That the subject, insofar as is known, was not in the State of North Carolina at the time of the commission of the crime of which he is charged and has not since that time fled from this State, but that this requisition is sought under Section 6 of the Uniform Extradition Act (G.S. 15-60), which your applicant is informed has been adopted by the State of; and that the subject, while in the State of, committed an act, to wit, which intentionally resulted in the commission of a crime, to wit, in the State of North Carolina."

APPENDIX V—EXTRADITION

Sworn to and subscribed before me,
this the day of, 19.....

.....
Clerk of Superior Court of
..... County, North Carolina.

[Here attach quadruplicate copies of warrant and of affidavit or complaint on which it was issued, each copy being certified as follows]:

STATE OF NORTH CAROLINA
COUNTY OF

CERTIFICATE

I,, a duly appointed, qualified and acting Magistrate or Judge of County, North Carolina, do hereby certify that the foregoing is a true and correct copy of (1) the warrant issued by me on, 19....., against, charging the said, with the crime of, and (2) the affidavit on which the warrant was issued.

IN TESTIMONY HEREOF, I have hereunto set my hand, this the day of, 19.....

.....
Magistrate or Judge of
County, North Carolina.

STATE OF NORTH CAROLINA
COUNTY OF

CERTIFICATE

I,, Clerk of the Superior Court of County, North Carolina, a court of record, do hereby certify:

1. That is Solicitor of the Solicitorial District of North Carolina; and that the attached application for the requisition has been signed by, Solicitor as aforesaid;

2. That, whose genuine signature appears upon the foregoing certificate and warrant, was a duly appointed, qualified, and acting Magistrate or Judge of County, North Carolina, at the time the said warrant was issued and the certificate executed.

3. That the attached warrant and affidavit, charging with the crime of, is a true and correct copy of the warrant issued by the said, Magistrate or Judge as aforesaid, on, 19....., and of the affidavit on which it was issued.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal of my said office, this the day of, 19.....

.....
Clerk of Superior Court of

[Seal of Court]

..... County, North
Carolina.

STATE OF NORTH CAROLINA
COUNTY OF

CERTIFICATE

I,, Resident [or Presiding] Judge of the Judicial District of North Carolina, embracing the county of, do hereby certify that, whose name is subscribed to the foregoing and annexed certificate, is Clerk of the Superior Court of County, North Carolina, duly elected and sworn, and that full faith and credit are due his official acts. I further certify that the seal affixed to said certificate is the seal of said Court and the exemplification is au-

APPENDIX V—EXTRADITION

thenticated in due form and by proper officer and in his own handwriting, and in such a form and manner that it would be received in any Court in this State.

IN TESTIMONY WHEREOF, I have hereunto set my hand at
North Carolina, this the day of, 19.....

.....
Resident [or Presiding] Judge of the
..... Judicial District
of North Carolina.

STATE OF NORTH CAROLINA
COUNTY OF

CERTIFICATE

I,, Clerk of the Superior Court of,
County, North Carolina, do hereby certify that, whose name
is subscribed to the foregoing certificate is the Resident [or Presiding] Judge of
the Superior Courts of the Judicial District embracing the
County of, duly elected and sworn, and that the signature
of said Judge to the said certificate is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal of said Court
at, North Carolina, this the day of
....., 19.....

[Seal of Court]

.....
Clerk of the Superior Court of
..... County,
North Carolina.

Appendix VI.

Forms To Be Followed Where Indictment Has Been Found.

[Application and accompanying papers must be submitted in quadruplicate.]

STATE OF NORTH CAROLINA
COUNTY OF

APPLICATION FOR REQUISITION

....., Solicitor of the Solicitorial
District of North Carolina, hereby makes this verified application for the requisition
of and in support of such application,
the said Solicitor hereby shows the following facts:

1. That the name of the person for whom requisition is asked is
2. That in his opinion, the ends of public justice require that the subject be
arrested and brought to the State of North Carolina for trial at the public expense.

3. That he believes that he has sufficient evidence to secure the conviction of
the subject.

4. That the name of the agent proposed to receive the subject from the proper
authorities of the State of and bring him to the State
of North Carolina for trial is; and that the person named as
agent is a proper person and that he has no private interest in the arrest and
conviction of the subject.

5. That there has been no former request for the requisition of the subject
growing out of the same transaction herein alleged.

[Note: If there has been any former application for requisition of the same
person growing out of the same transaction, it must be so stated, together with
the date of such prior application(s) as near as may be, and with an explanation
of the reasons for the present request.]

6. That the subject is now in the State of
and in the custody of

APPENDIX V—EXTRADITION

7. That this application is not made for the purpose of collecting a debt or enforcing a private claim, or for any private purpose whatever, and that if the requisition applied for be granted, the criminal proceedings will not be used for any of said objects.

8. That the extradition of the subject to the State of North Carolina is hereby requested for the purpose of trial on the charge of committing the crime of, as set forth in the indictment heretofore found against him on the day of, 19...., by the grand jurors for the State of North Carolina in and for the County of, attending the Superior Court of the said county, which indictment is now pending against the subject, and quadruplicate original copies of which indictment are hereto attached.

[That the alleged crime was committed in, North Carolina, on or about the day of, 19...., and that the subject was present in, North Carolina, at the time of the commission of the alleged crime, and thereafter the subject fled from the State of North Carolina.]*

9. That this application was made as soon as the subject could be located.

10. That this application is verified by, Solicitor as aforesaid, and is executed in quadruplicate and is accompanied by certified copies of the indictment heretofore found against the said subject by the grand jurors for the State of North Carolina in and for the County of, attending the Superior Court of said county, which indictment is now pending against the subject.

Verified this the day of, 19....

.....
Solicitor of the
..... Solicitorial District
of North Carolina.

Sworn and subscribed before me, this
the day of, 19....

.....
Clerk of Superior Court of
..... County, North Carolina.

[Here attach quadruplicate copies in the indictment, each copy being certified as follows:]

STATE OF NORTH CAROLINA

COUNTY OF

CERTIFICATE

I,, Clerk of the Superior Court of County, North Carolina, a court of record, do hereby certify:

1. That is Solicitor of the Solicitorial District of North Carolina; and that the attached application for the requisition of has been signed by Solicitor as aforesaid;

2. That the indictment hereto attached is a true and correct copy of an indictment against, found to be a true bill on the day of, 19.., by the grand jurors for the State of North

*If requisition is sought under G.S. 15-60, a statement in the following form should be substituted for the bracketed sentence above: "That the subject insofar as is known, was not in the State of North Carolina at the time of the commission of the crime of which he is charged and has not since that time fled from this State, but that this requisition is sought under Section 6 of the Uniform Extradition Act (G.S. 15-60) which your applicant is informed has been adopted by the State of and that the subject, while in the State of, committed an act, to wit, which intentionally resulted in the commission of a crime, to wit in the State of North Carolina."

APPENDIX V—EXTRADITION

Carolina, in and for the County of, attending the Superior Court of the said county; that the original indictment is on file in my office; and that the said indictment is now pending against the said

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said court, this day of, 19....

[Seal of Court]

.....
Clerk of Superior Court of
..... County,
North Carolina.

STATE OF NORTH CAROLINA

COUNTY OF

CERTIFICATE

I,, Resident [or Presiding] Judge of the Judicial District of North Carolina, embracing the County of, do hereby certify that, whose name is subscribed to the foregoing and annexed certificate, is Clerk of the Superior Court of County, North Carolina, duly elected and sworn, and that full faith and credit are due his official acts. I further certify that the seal affixed to said certificate is the seal of said Court and the exemplification is authenticated in due form and by proper officer and in his own handwriting, and in such a form and manner that it would be received in any Court in this State.

IN TESTIMONY WHEREOF, I have hereunto set my hand at, North Carolina, this the day of, 19....

.....
Resident [or Presiding] Judge of
the Judicial District
of North Carolina.

STATE OF NORTH CAROLINA

COUNTY OF

CERTIFICATE

I,, Clerk of the Superior Court of County, North Carolina, do hereby certify that, whose name is subscribed to the foregoing certificate is the Resident [or Presiding] Judge of the Superior Courts of the Judicial District embracing the County of, duly elected and sworn, and that the signature of said Judge to the said certificate is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal of said Court at, North Carolina, this the day of, 19....

[Seal of Court]

.....
Clerk of the Superior Court of
..... County,
North Carolina.

Appendix VII.

Forms To Be Followed for Return of Escaped Prisoners.

[Note: These forms, with appropriate modifications, should also be used when applying for requisition of persons who have violated probation.]

[Application and accompanying papers must be submitted in quadruplicate.]
(The Commission of Correction may draw up the papers in his name in majority of escape cases.)

(Application and accompanying papers must be submitted in duplicate.)

STATE OF NORTH CAROLINA

COUNTY OF

APPLICATION FOR REQUISITION

APPENDIX V—EXTRADITION

....., Solicitor of the
Solicitorial District of North Carolina [or other proper title], hereby makes
this verified application for the requisition of, fugitive
from justice, and in support of such application, the said Solicitor hereby shows
the following facts:

1. That the name of the person for whom requisition is asked is
2. That in his opinion, the ends of public justice require that the subject be
arrested and brought to the State of North Carolina at the public expense.
3. That the name of the agent proposed to receive the subject from the proper
authorities of the State of and bring him to the State of
North Carolina for trial is;
and that the person named as agent is a proper person and that he has no
private interest in the arrest and conviction of the subject.
4. That there has been no former request for the requisition of the subject
growing out of the same transaction herein alleged.

[Note: If there has been any former application for requisition of the same
person growing out of the same transaction, it must be so stated, together with
the date of such prior application(s) as near as may be, and with an explanation
of the reasons for the present request.]

5. That the subject is now in the State of,
and in the custody of

6. That this application is not made for the purpose of collecting a debt or
enforcing a private claim, or for any private purpose whatever, and that if the
requisition applied for be granted, the criminal proceedings will not be used for
any of said objects.

7. That the said subject is charged with escaping from
without having completed his sentence, after having been convicted of
....., and sentenced to in

8. That this application was made as soon as the subject could be located.

9. That this application is verified by, Solicitor
[or other proper title] as aforesaid, and is executed in quadruplicate and is accom-
panied by certified copies of the indictment* found against the subject, the judg-
ment of conviction and sentence upon which he was being held at the time of
his escape, and the affidavit of the officer from whose custody he escaped, show-
ing such escape and the circumstances attending the same.

Verified this the day of, 19....

.....
Solicitor of the
Solicitorial District of North Carolina.
[or other proper title].

Sworn to and subscribed before me,
this the day of, 19...

.....
Clerk of Superior Court of
..... County,
North Carolina.

[Form of affidavit to be made in quadruplicate by Solicitor or by officer from
whose custody the prisoner escaped.]

STATE OF NORTH CAROLINA
COUNTY OF

AFFIDAVIT

This day, personally appeared before me,
....., Clerk of the Superior Court of
County, North Carolina, and after first being duly sworn, stated that in the

*Where the subject has been tried upon the warrant (rather than upon an indictment),
certified copies of the warrant should be attached in lieu of the indictment.

APPENDIX V—EXTRADITION

..... Court for the County (City) of, in the State of North Carolina, on the day of, 19...., the subject,, was convicted of, and was sentenced to confinement in the for a term of, as shown by certified copy of the indictment [or warrant] and judgment attached; that the said subject was accordingly confined in the from which he escaped on the day of, 19...., without having completed his sentence; and that the said subject is now in the State of and in the custody of

.....
[Name and official title of officer making affidavit].

Sworn to and subscribed before me,
this the day of, 19....

.....
Clerk of Superior Court of
..... County,
North Carolina.

[Here quadruplicate copies of the indictment* and the judgment of conviction and sentence, certified as follows:]

STATE OF NORTH CAROLINA
COUNTY OF

CERTIFICATE

I,, Clerk of the Superior Court of County, North Carolina, a court of record, do hereby certify:

I,, Clerk of the Superior Court of Solicitorial District of North Carolina; and that the attached application for the requisition of has been signed by, Solicitor as aforesaid.

2. That the attached copy of an indictment* is a true and correct copy of an indictment against the subject, found to be a true bill on the day of, 19...., by the grand jurors of the State of North Carolina in and for the County of, attending the Superior Court of the said county; that the indictment is now pending against the said; and that the original indictment is on file in my office.

3. That the attached copy of a judgment of conviction and sentence is a true and correct copy of a judgment rendered against the subject in the Court of County (City) on the day of, 19....; and that the original judgment is on file in my office.

4. That is Solicitor of the Solicitorial District of North Carolina [or other proper title]; and that the attached affidavit regarding the escape of the subject from confinement was signed by the said, Solicitor [or other proper title] as aforesaid.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal of my said office, this the day of, 19....

[Seal of Court]

.....
Clerk of Superior Court of
..... County,
North Carolina.

STATE OF NORTH CAROLINA
COUNTY OF

CERTIFICATE

*Where the subject has been tried upon the warrant (rather than upon an indictment), certified copies of the warrant should be attached in lieu of the indictment.

APPENDIX V—EXTRADITION

I,, Resident [or Presiding] Judge of the
Judicial District of North Carolina, embracing the County of,
do hereby certify that, whose name is subscribed to the
foregoing and annexed certificate, is Clerk of the Superior Court of
..... County, North Carolina, duly elected and sworn, and that full faith
and credit are due to his official acts. I further certify that the seal affixed to said
certificate is the seal of said Court and the exemplification is authenticated in
due form and by proper officer and in his own handwriting, and in such a form
and manner that it would be received in any Court in this State.

IN TESTIMONY WHEREOF, I have hereunto set my hand at,
North Carolina, this the day of, 19....

.....
Resident [or Presiding] Judge of the
..... Judicial District
of North Carolina.

STATE OF NORTH CAROLINA
COUNTY OF

CERTIFICATE

I,, Clerk of the Superior Court of
County, North Carolina, do hereby certify that,
whose name is subscribed to the foregoing certificate is the Resident [or Pre-
siding] Judge of the Superior Courts of the Judicial District
embracing the County of, duly elected and sworn, and
that the signature of said Judge to the said certificate is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal of said Court
at, North Carolina, this the day of
....., 19....

[Seal of Court]

.....
Clerk of the Superior Court of
..... County North Carolina.

Appendix VIII.

Miscellaneous Forms.

STATE OF
COUNTY OF

WAIVER OF EXTRADITION

....., having been arrested in this State and charged with
having committed the crime of in the County of
..... in the State of, does hereby
voluntarily waive the issuance and service of warrants provided for in Sections
15-61 and 15-62 of the North Carolina General Statutes, and all other procedure
incidental to extradition, and does further state personally before the under-
signed Judge that he consents to return to the demanding State upon the arrival
of authorities from said demanding State, and does thus waive extradition.

Witness my hand and seal, this day of, 19....
..... (SEAL)

I,, Judge of Court of
..... County (City), State of,
the same being a court of record, do hereby certify that,
appeared personally before me this day and acknowledged signing the above
waiver of extradition, after being informed by me of his legal rights with respect
thereto.

Witness my hand and seal of the court this day of,
19....

.....
Judge, Court of
County,
State of

Appendix IX.

Additional Suggestions and Points for Special Attention.

1. At the Interstate Extradition Conference, held in New York in August, 1887, it was resolved by the representatives of several states: "That it is the sense of this Conference that the Governors of the demanding states discourage proceedings for the extradition of persons charged with petty offenses, and that, except in special cases, under aggravated circumstances, no demand should be made in such cases."

2. Requisition will not issue in cases of fornication and desertion (except under special and aggravated circumstances), nor in any case to aid in collecting a debt or enforcing a civil remedy, nor in cases in which the offense is of such trivial character as to leave a doubt as to the issuing of a mandate thereon by the executive of another state or territory; nor in case of seduction, unless the indictment or warrant and affidavits clearly establish the relations of the parties so as to leave no doubt that the case is one of seduction, and not of fornication.

3. Requisition will not be issued on petition alone, but the copies of the record and affidavits required by the preceding rules must in every case be furnished, and this regulation will be applied with special strictness in all cases where the charge is cheating, obtaining money by false pretenses, embezzlement and the like. False and deceitful representations must be particularly set forth.

4. All papers presented in connection with an application for a requisition must be in quadruplicate.

5. The agent should, when possible, be the sheriff of the county or his deputy.

6. The fugitive must be in custody before any requisition will be issued.

7. Applications for requisition papers must be forwarded directly/BY MAIL to the Governor's Office to the Extradition Officer, N. C. Governor's Office, P. O. BOX 2539, Raleigh, N.C.

8. The Governor requests the solicitor to report the final disposition of each case.

9. All affidavits must be made before OFFICERS AUTHORIZED TO ISSUE CRIMINAL WARRANTS.

10. Authority MUST be secured from the Governor's Office before expenses are incurred in connection with returning fugitives from justice from outside the State when the extradition process is *not* used.

11. The Solicitors should send at least four (4) sets of papers at all times. In the event of hearings in the asylum states, they would need at least three copies (3); and the Governor's Office always keeps one (1) copy for its files.

12. By following the suggestions in this booklet, extradition will be rendered rather simple, and the handling of particular cases will be considerably expedited.

FORM OF RENDITION WARRANT

THE GOVERNOR OF THE STATE OF NORTH CAROLINA.

To the Sheriff or other Officer of the State of North Carolina to whom these Presents shall come—Greeting:

Whereas, It has been represented to me by the Governor of that stand charged with the crime of which he certifies to be a crime under the laws of said State, committed in the County of in the said State, and ha.... taken refuge in the State of North Carolina, and the said Governor of having, in pursuance of the Constitution and Laws of the United States, demanded of me that I shall cause the said to be arrested and delivered to, who is duly authorized to

APPENDIX V—EXTRADITION

receive into his custody and convey back to the said State of

And Whereas, The said representation and demand is accompanied by whereby the said shown to have been duly charged with the said crime, and with having fled from said State of and taken refuge in the State of North Carolina, which duly certified by the said Governor of to be authentic and duly authenticated;

Therefore, You are hereby required to arrest and secure the said wherever may be found within the State of North Carolina, and afford such opportunity to sue out a writ of Habeas Corpus as is prescribed by the laws of this State and to thereafter deliver into the custody of the said to be taken back to the said State, from which fled, pursuant to the said requisition; and also to return this warrant and make return to the Governor of North Carolina within thirty days from the date hereof, of all your proceedings had thereunder, and of all the facts and circumstances relating thereto.

In Witness Whereof, I have hereunto signed my name and affixed the Great Seal of State, at the Capitol in the City of Raleigh, this day of in the year of our Lord one thousand nine hundred and and in the one hundred and year of our American Independence.

.....
Governor

By the Governor:

.....
Private Secretary
Executive Clerk

FORM OF AGENT'S COMMISSION AND RETURN

THE GOVERNOR OF THE STATE OF NORTH CAROLINA,

To all Men to Whom These Presents May Come—Greeting:

Know All Men, That I, Governor of the State of North Carolina, by virtue of authority in me vested by the Constitutions and Laws of the State of North Carolina and and in pursuance thereof, do hereby authorize, commission and appoint Agent of the State of North Carolina to convey to the County therein, to be dealt with according to law.

In Witness Whereof, I have hereunto signed my name and affixed the Great Seal of State, at the Capitol in the City of Raleigh, this day of in the year of our Lord one thousand nine hundred and and in the one hundred and year of our American Independence.

.....
Governor

By the Governor:

.....
Private Secretary
Executive Clerk

STATE OF NORTH CAROLINA
COUNTY OF

APPENDIX V—EXTRADITION

I hereby certify that I have executed the within commission by going after, receiving from the proper authorities of the State of, and returning the fugitive named therein, and delivering him to the proper authorities at, as authorized and empowered therein, this the day of, 19...

.....
Agent of the State of North Carolina

I hereby certify that I received from, Agent of the State of North Carolina, named in the within Commission, the fugitive at, this the day of 19.....

.....
.....

Appendix VI. Rules, Regulations and Organization of The North Carolina State Bar

Article I.

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1. Purpose.
2. Division of Work.
3. Cooperation with Local Bar Association Committees.
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1. Action on Report of Grievance Committee.
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1. When Papers Are Filed under These Rules and Regulations.

Article XI.

Seal.

1. Form and Custody of Seal.

ARTICLE I.

Functions.

§ 1. **Purpose.**—The North Carolina State Bar shall foster the following purposes, namely:

- To cultivate and advance the science of jurisprudence;
- To promote reform in the law and in judicial procedure;
- To facilitate the administration of justice;
- To uphold and elevate the standards of honor, of integrity and of courtesy in the legal profession;
- To encourage higher and better education for membership in the profession;

To promote a spirit of cordiality and brotherhood among the members of the Bar; and

To perform all duties imposed by law.

§ 2. **Division of Work.**—To facilitate the work for the accomplishment of the above enumerated purposes, the Council may, from time to time, classify such work under appropriate sections and committees of The North Carolina State Bar.

§ 3. **Cooperation with Local Bar Association Committees.**—The sections and committees so appointed may secure the cooperation of like sections and committees of The North Carolina Bar Association and all local Bar Associations of the State.

§ 4. **Organization of Local Bar Associations.**—The Council shall encourage and foster the organization of local Bar Associations.

§ 5. **Annual Program.**—The Council shall provide a suitable program for each annual meeting of The North Carolina State Bar.

§ 6. **Reports Made to Annual Meeting.**—The reports of the several sections and committees, with their recommendations, shall be delivered to the Secretary of The North Carolina State Bar at least thirty days before the annual meeting. Such reports, together with any reports from special committees that the Council desires to present to the annual meeting, may be printed and sent to each member of The North Carolina State Bar at least twenty days before such meeting. Nothing herein shall preclude any section, committee or the Council from presenting a report of recommendation that has not been so printed and mailed.

ARTICLE II.

Membership—Annual Membership Fees.

§ 1. **Register of Members.**—The Secretary-Treasurer shall keep a register for the enrollment of members of The North Carolina State Bar. In appropriate places therein entries shall be made showing the address of each member, date of registration and class of membership, date of transfer from one class to another, if any, date and period of suspension, if any, and such other useful data which the Council may from time to time require.

Every member shall register by signing a registration card, which in substance shall require, until the future order of the Council, the member to furnish the following information:

1. Name and address.
2. Date.
3. Date passed examination to practice in North Carolina.
4. Date and place sworn in as an attorney.
5. Date and place of birth. If not born in the United States, when and where naturalized.
6. Whether admitted to the United States District Court, United States Circuit Court of Appeals, or United States Supreme Court.
7. Membership, if any, in bar associations, giving name of each.
8. Whether suspended or disbarred, and if so, when and where, and when readmitted.

§ 2. **Annual Membership Fees; When Due.**—The annual membership fee shall be in the amount fixed by statute and said membership fee shall be due and payable to the Secretary-Treasurer on the first day of January in each year and the same shall become delinquent if not paid on or before July 1 of each year.

No part of said membership fee shall be apportioned to fractional parts of the year, and no part of the membership fees shall be rebated by reason of death, resignation, suspension or disbarment.

Written notice of failure to pay annual membership fees shall be sent to a member at his last known business address by the Secretary of the State Bar.

It is the policy of the Council that any attorney who has been suspended for the nonpayment of dues be reinstated only upon the payment of all past dues, plus interest and costs, plus \$25.00 reinstatement fee.

§ 3. Petition of Member Claiming to Be Inactive.—All members who claim to be inactive shall file a duly verified petition with the Secretary addressed to the Council setting forth fully:

1. Date of admission to the Bar and place of residence from which admitted.
2. The practice, times and places.
3. Present occupation or work engaged in and residence, and duties performed during the period the applicant claims to be or have been inactive.
4. Grounds upon which applicant desires classification.
5. That applicant is at the time of filing petition a member in good standing having paid all fees required and without any charges undisposed of against him.
6. Any further matters pertinent to the petition.

§ 4. Order Placing Petitioner on Inactive List.—The Council may in its discretion order the petitioner to be placed on the inactive list of membership on the records of the Secretary and may in its discretion revoke such order at any time.

It is the policy of the Council from and after April 18, 1969 that:

Members of The North Carolina State Bar serving in the armed services whether in a legal or a nonlegal capacity will be exempt from payment of dues so long as they are on active duty in the military service.

Each inquiry be treated on an individual basis and that those attorneys who are found to be engaged in a very limited capacity and who are 75 years of age and over that they be granted inactive status upon proper petition.

Any attorney assuming a judicial position of any kind and nature which precludes him from the practice of law shall become inactive during the period he holds said position and exempt from the payment of dues.

§ 5. Application for Reinstatement.—Any person who has been a member of The North Carolina State Bar, but who has been placed on the inactive list, and who desires to be reinstated or to resume the practice of law within this State may be reinstated as an active member upon the following conditions:

(1) That he make application for active membership on a form to be prescribed by the Council and supply under oath all information therein requested.

(2) That he satisfy the Council that he intends to resume the practice of law in North Carolina and that he has the moral qualifications, competency and learning in the law required for admission to practice law in the State of North Carolina, and that his resumption of the practice of law within this State will be neither detrimental to the integrity and standing of the Bar or the administration of justice nor subversive to the public interest.

(3) That he submit with his application a fee of Seventy-five Dollars (\$75.00) if applicant be a nonresident of the State of North Carolina or Fifty Dollars (\$50.00) if he be a resident of the State of North Carolina to be retained by The North Carolina State Bar.

(4) That if the application is granted, the attorney promptly pay dues for the current year in which the application is filed.

ARTICLE III.

Election of Officers.

§ 1. Election of Officers.—The officers of The North Carolina State Bar, in addition to the Councillors, shall consist of a President, a first Vice-President, a second Vice-President, and Secretary-Treasurer. The Secretary-Treasurer shall

receive a salary fixed by the Council; other officers shall serve without compensation, except per diem allowance fixed by the Statute.

The President and First Vice-President shall be elected by the Councillors from the active members of The North Carolina State Bar.

At each annual meeting of The North Carolina State Bar the active members present shall elect a President and two Vice-Presidents who shall assume the duties of their offices on the first day of November following their election and hold office for one year or until their successors are elected and qualified. The Secretary-Treasurer shall be elected by the Council annually. No officer elected by the Council or by The North Carolina State Bar need be a member of the Council. All such officers shall be the officers of the Council with the same titles.

ARTICLE IV.

Duties of Officers.

§ 1. **Absence or Inability of President.**—In the absence or inability of the President at any meeting of The North Carolina State Bar or the Council, one of the Vice-Presidents shall act in his place. In the event neither is present, the Council shall select one of its members to preside during such meeting.

In all other matters, if the President absents himself from the State, or for any reason is unable to perform his duties as president, the first Vice-President shall perform the duties of president and likewise in his absence the second Vice-President shall act. In the event of the inability of either to perform the duties of president, the Council may select one of their members to act until such absence or inability is removed.

§ 2. **Duties of Secretary-Treasurer.**—The Secretary-Treasurer shall attend all meetings of the Council and of The North Carolina State Bar, and shall record the proceedings of all such meetings. He shall, with the President or one of the Vice-Presidents, execute all contracts ordered by the Council. He shall have custody of the seal of The North Carolina State Bar, and shall affix it to all documents executed on behalf of the Council or certified as emanating from the Council. He shall take charge of all funds paid into The North Carolina State Bar and deposit them in some bank selected by the Council; he shall cause books of accounts to be kept, which shall be the property of The North Carolina State Bar and which shall be open to the inspection of any officer, committee or member of The North Carolina State Bar during usual business hours. At each January meeting of the Council, the Secretary-Treasurer shall make a full report of receipts and disbursements since the previous annual report, together with a list of all outstanding obligations of The North Carolina State Bar. The books of accounts shall be audited as of December 31st of each year and the Secretary shall publish same in the annual reports as referred to above. He shall perform such other duties as may be imposed upon him, and shall give bond for the faithful performance of his duties in an amount to be fixed by the Council with surety to be approved by the Council.

ARTICLE V.

Meetings of The North Carolina State Bar.

§ 1. **Annual Meetings.**—The annual meeting of The North Carolina State Bar, beginning with the year 1969, shall be held at such time and place within the State of North Carolina, after such notice (but not less than 30 days) as the Council may determine.

§ 2. **Special Meetings.**—Special meetings of The North Carolina State Bar may be called upon thirty days' notice, as follows:

(a) By the Secretary, upon direction of the Council.

(b) By the Secretary, upon the call addressed to the Council, of not less than twenty-five per cent of the active members of The North Carolina State Bar.

At special meetings no subjects shall be dealt with other than those specified in the notice.

§ 3. **Notice of Meetings.**—Notice of all meetings shall be given by publication in such newspapers of general circulation as the Council may select, or, in the discretion of the Council, by mailing notice to the Secretary of the several district bars or to the individual active members of The North Carolina State Bar.

§ 4. **Quorum.**—At all annual and special meetings of The North Carolina State Bar, a quorum shall be determined by the provisions of the Statute applicable thereto, but there shall be no voting by proxy.

§ 5. **Parliamentary Rules.**—Proceedings at any meeting of The North Carolina State Bar shall be governed by "Roberts' Rules of Order."

ARTICLE VI.

Meetings of the Council.

§ 1. **Regular Meetings.**—Regular meetings of the Council shall be held on the first Friday after the second Monday in each of the months of January, April and July, at such time and place after such notice (but not less than 30 days) as the Council may determine; and on the day before the Annual Meeting of The State Bar, at the location of said Annual Meeting. The hour of meeting shall in each case be at 10 o'clock a.m. Any regular meeting may be adjourned from time to time as a majority of members present may determine.

§ 2. **Special Meetings.**—The President in his discretion may call special meetings of the Council. Upon written request of eight Councillors, filed with the Secretary-Treasurer requesting the President to call a special meeting of the Council, the Secretary shall, within five days thereafter, call such special meeting. The date fixed for such meeting shall not be less than five days nor more than ten days from the date of such call.

§ 3. **Notice of Called Special Meetings.**—Notice of called special meetings shall be signed by the Secretary. The notice shall set forth the day and hour of the meeting and the place for holding the same. Any business may be presented for consideration at such special meeting. Such notice must be given to each Councillor unless waived by him. A written waiver signed by any Councillor shall be equivalent to notice as herein provided. Notice to Councillors not waiving as aforesaid shall be in writing and may be communicated by telegraph, or by letter through the United States mail in the usual course, addressed to each of said Councillors at his law office address. Notice by telegraph shall be filed with the telegraph carrier for transmission at least three days, and notice by mail shall be deposited in the United States post office at least five days, before the day fixed for the special meeting.

§ 4. **Quorum at Meeting of Council.** — At meetings of the Council the presence of ten Councillors shall constitute a quorum.

§ 5. **Standing Committees of the Council.**—Within twenty (20) days after his election, the President of the Council shall select the standing committees to serve for one year beginning January 1 of the year succeeding his election which said committees shall consist of:

a. An Executive Committee of not less than five Councillors to be selected by the President.

It shall be the duty of the Executive Committee to perform such duties as the Council shall designate, including, however, the auditing of the books and records of the Secretary-Treasurer at each regular meeting of the Council.

b. Committee on Legal Ethics and Professional Conduct of not less than three Councillors selected by the President.

It shall be the duty of the Committee on Legal Ethics and Professional Conduct to study canons of ethics and professional conduct and make such recommendations from time to time to the Council as it may deem proper and necessary; study and determine such questions as may arise as to the meaning and application of the canons of ethics and rules of professional conduct, and advise members of the State Bar upon request in respect thereto, and perform such other duties in connection with the canons of ethics and rules of professional conduct as it may be requested to perform by the Council of The North Carolina State Bar.

c. Committee on Grievances of not less than three Councillors selected by the President.

1. It shall be the duty of the Committee on Grievances to investigate and study all complaints or allegations of misconduct which may be made against members of the State Bar. The Committee shall likewise have authority to investigate and study on its own motion all matters which may have come to its attention relating to alleged unprofessional conduct on the part of any member of The North Carolina State Bar. The Committee may include in its investigation all matters which may come to its attention with reference to the member complained of. It shall make a report to the Council at each quarterly meeting of the action taken by it upon all matters which have come to its attention, and its recommendations in regard thereto. If the recommendation of the Committee on Grievances is for dismissal of the charges, the report shall be private. It shall not be necessary to examine witnesses, but the Committee shall have authority to require affidavits or other statements in sufficient form and substance to satisfy it as to the probable truth of the charges contained in the complaint.

2. The Secretary may require all complaints to be in the form of affidavits upon forms prepared for such purpose. Where the complaint or allegation on its face requires it, the Secretary shall obtain certified copies of court records, or verified copies of any other exhibit or exhibits, which shall accompany and be attached to the complaint. The provisions of this paragraph shall be directory only and not mandatory.

3. All complaints or charges of misconduct lodged with the Secretary shall be immediately forwarded to the Chairman of the Grievances Committee for initial screening.

4. If the Chairman of the Grievances Committee is of the opinion that the complaint should be entertained, he shall forthwith proceed to issue letter of notice to the accused attorney, setting forth the substance of the charges made against him in sufficient detail to enable such accused attorney to file an intelligent answer thereto, and notifying the accused attorney to file his preliminary answer to the charges within 15 days of the receipt of such letter of notice, and further advising such accused attorney that he may attach to his answer such exhibits as he may desire, which letter of notice shall be forwarded to such accused attorney by certified or registered mail. The answer need not be verified, but all exhibits attached thereto must be certified.

5. Any action taken by the Chairman of the Grievances Committee shall be reviewed by the full Committee.

6. After answer has been filed by the accused attorney, or the time for filing such answer has expired, the Grievances Committee shall consider the charges filed and make recommendation to the full Council.

7. Where, in each case in which the Council votes action other than dismissal, the Secretary shall keep a docket on such case, listing thereon the action taken, the date thereof, and the progress of the case from the time of its original institution until its final conclusion.

d. Committee on Legislation and Law Reform of not less than three Councillors selected by the President.

It shall be the duty of the Committee on Legislation and Law Reform to ex-

amine proposed changes in the law; to examine and propose changes in the law and judicial procedure; to promote the simplification of law and procedure; and perform such other duties in connection with the improvement of law and procedure as may from time to time be requested by the Council of The North Carolina State Bar.

The Committee on Legislation and Law Reform shall not appear before committees of the Legislature, except upon the approval of the Council, nor shall it make specific endorsements of changes in the laws or of new laws except with the consent of the Council.

e. Committee on Unauthorized Practice of not less than three Councillors selected by the President.

f. Committee on Membership of not less than three Councillors selected by the President.

g. The Committee on Legal Aid to Indigents and Referrals consisting of not less than five Councillors and officers of the Council.

1. For the purpose of implementation of these rules, the Council shall establish a standing committee to be designated as the Committee on Legal Aid to Indigents and Referrals, whose duties shall consist of aiding and assisting any and all districts of The North Carolina State Bar in establishing a plan for the representation of indigents in civil and certain criminal cases and lending assistance and advice in the carrying out of these programs in accordance with the laws of the State of North Carolina and the ethics of the legal profession. Such plans shall include not only matters involving litigation, but also matters involving consultation, advice, drafting of legal instruments and other legal services customarily rendered by attorneys to clients.

2. Any District Bar as provided in G.S. 84-18 may adopt a plan for the naming and designation of the attorneys to serve as counsel for indigents in civil cases or in criminal cases not covered by Chapter 1080 of the Sessions Laws of 1963. Such plans may be applicable to the entire district or at the election of the District Bar separate plans may be adopted by the District Bar for use in each separate county within the district.

(a) Prior to the appointment of counsel in any civil case on grounds of indigency there shall first be a determination of indigency by a committee of the District Bar appointed for such purpose by the officers of the District Bar. In emergency situations, such as in the case of injunctions or habeas corpus proceedings to determine custody, and other similar situations where time is of the essence, the legal aid committee shall have authority to appoint counsel without awaiting a determination of indigency.

(b) For the purpose of determining indigency the District Bar shall appoint a committee or committees of its members to serve as a committee of the District Bar to be designated as Legal Aid Committee which shall determine upon appropriate forms whether or not an individual who has requested representation on the grounds of indigency is in fact an indigent. This committee may utilize as advisory members public officials of the community, or their designees, who may render assistance to the committee as they are called upon.

(c) An individual who desires representation of counsel upon the grounds that he is an indigent shall complete forms provided by the committee of legal aid for the district and the same shall be forwarded to the Legal Aid Committee for their consideration.

(d) Upon the basis of the individual's representations of indigency and such other information as may be brought to the attention of the Legal Aid Committee, the committee shall determine whether or not the individual is in fact an indigent, and if he is determined to be an indigent the committee shall appoint counsel to represent the individual in accordance with the plan so adopted for this purpose by the District Bar. Nothing contained herein shall require any attorney to accept appointment to represent an indigent person in any case. Any attorney accepting appointment to represent an indigent person under these Rules and Regulations shall stand in the attorney-client relationship to such indigent person in the same

manner as if privately employed, and such attorney may withdraw from such representation in the same manner as attorneys privately employed.

3. Such plan or plans as adopted by the District Bar shall be certified to the Council of The North Carolina State Bar before such plans are put into effect. Thereafter all appointments of counsel for indigents in said Districts shall be made in conformity with such plan or plans, unless in the exercise of the sound discretion of the Legal Aid Committee they deem it proper in the furtherance of justice to appoint as counsel for an indigent some lawyer or lawyers residing and practicing in the judicial district who is or are not on the plan or list certified to the Council of The North Carolina State Bar, and if so, the committee is authorized to appoint as counsel to represent said indigent some lawyer or lawyers not on said plan or list residing or practicing in the judicial district.

No attorney shall be appointed as counsel for an indigent in a court of any district except the district in which he resides or maintains an office except by consent of counsel so appointed.

No indigent shall be entitled or permitted to select or specify the attorney who shall be assigned to represent him.

The special committee of the district shall maintain and keep current the plan for the assignment of counsel applicable to said county as certified by the district bar in which such county is located.

All orders for the appointment of counsel shall be made a part of the file maintained by the special committee with appropriate copies being forwarded to the attorney so assigned.

4. If the special committee shall so find that the request of the individual is not a proper one for representation as an indigent according to the plan of the district, then the individual shall be offered the services of a referral plan whereby the individual is referred to a lawyer or lawyers from a list of attorneys maintained for the purpose of referrals in such cases so provided.

The determination of whether or not the case is a proper one for representation as an indigent or on a referral basis shall be according to the rules prescribed by the district; provided, however, no fee producing case, workmen's compensation case, contingent fee case or the like, shall entitle such indigent to appointment of counsel.

5. Representation of indigents under these Rules and Regulations shall be performed by attorneys at law duly licensed and authorized to practice in the State of North Carolina. The district bar may receive any and all funds, including but not limited to those emanating from the Federal Government or any agency thereof, appropriated, bequeathed or given to the district bar for the purpose of funding the costs of rendering legal services to the poor. Any and all funds so appropriated, bequeathed or given shall be deposited in a special account with the Secretary or Treasurer of the district bar acting as custodian of said funds to be disbursed in such manner as the Committee on Legal Aid and Referrals of the district bar may determine by rules and regulations concerning the same.

6. Nothing herein shall prevent any attorney at law duly licensed and authorized to practice law in the State of North Carolina, or association of such attorneys, from conducting a legal aid clinic or legal aid programs, with or without compensation, for indigent persons separate and apart from the program of the district bar, so long as such legal aid clinic or legal aid program is conducted in accordance with the laws of the State of North Carolina and the Canons of Ethics and Rules and Regulations of The North Carolina State Bar.

7. Nothing contained in these Rules and Regulations shall in any way restrict the right of any attorney at law duly licensed and authorized to practice law in the State of North Carolina to render gratuitous legal services to any person whom he considers to be indigent, without the requirement of prior determination of indigency by such committee of the district bar.

8. Nothing contained in these rules shall in any wise affect the inherent powers of the courts of this State to deal with such matters and with attorneys, as officers of the courts of this State.

ARTICLES OF ASSOCIATION OF
THE LEGAL AID SOCIETY OF COUNTY (..... DISTRICT)

THIS CERTIFIES that we, the undersigned natural persons of the age of twenty-one years or more, do hereby organize ourselves into an unincorporated association under the laws of the State of North Carolina, and to that end do hereby set forth:

I

The name of the association is THE LEGAL AID SOCIETY OF COUNTY (..... DISTRICT), hereinafter referred to as "the Society."

II

The purposes for which the Society is organized are: For benevolent and charitable purposes, legal aid to be rendered gratuitously, through attorneys at law, to or for indigents of County, (..... District), of North Carolina, who may appear worthy thereof and who are unable to procure legal assistance elsewhere; to assist the poor and needy in the pursuit of any civil remedy; and to thereby advance the cause of justice for all under the law.

III

The Society shall have the right and power:

A. To elect or appoint officers and agents of the Society, define their duties, and fix their compensation.

B. To make and alter by-laws, not inconsistent with these Articles of Association or with the laws of the State of North Carolina, for the administration and regulation of the affairs of the Society.

C. To make donations for the public welfare or for religious, charitable, scientific or educational purposes.

D. To indemnify any trustee or officer or former trustee or officer of the Society or any person who may have served at its request as a trustee or officer of another association or corporation, against expenses actually and necessarily incurred by him in connection with the defense of any action, suit, or proceeding in which he is made a party by reason of being or having been such trustee or officer, except in relation to matters as to which he shall be adjudged in such action, suit, or proceeding to be liable for negligence or misconduct in the performance of duties to the Society, but such indemnification shall not be deemed exclusive of any other rights to which such trustee or officers may be entitled, under any by-law, agreements, vote of the Board of Trustees of this Society, or otherwise. The Society shall have no power, directly or indirectly, to engage in political, lobbying or propagandistic activity.

E. To cease its activities and to dissolve voluntarily subject to the provisions of Article XI hereunder.

IV

In connection with carrying out the purposes for which the Society is organized, set forth in Article III, above, the Society shall also have power:

A. To purchase, take, receive, lease, take by gift, devise or bequest, or otherwise acquire, own, hold, improve, use and otherwise deal in and with, real or personal property, or any interest therein, wherever situated.

B. To sell, convey, mortgage, pledge, lease, exchange, transfer and otherwise dispose of all or any part of its property and assets.

C. To acquire by purchase, subscription, gift, will or otherwise, and to own, hold, vote, use, employ, sell, mortgage, lend, pledge, administer or otherwise dispose of, and otherwise use and deal in and with, shares or other interests in, or obligations of, domestic or foreign corporations, associations, partnerships or individuals, or direct or indirect obligations of the United States or of any government,

state, territory, governmental district or municipality or of any instrumentality thereof.

D. To make contracts and incur liabilities, borrow money, issue its notes, bonds, and other obligations, and secure any of its obligations by mortgage or pledge of all or any of its property and income.

V

The Society shall consist of the signatures to these Articles of Association and their successors as herein provided, such persons to be hereinafter designated as the Board of Trustees.

VI

The affairs of the Society shall be managed by a Board of Trustees of fifteen members, all of whom shall be residents of (.....) County, (..... District) of North Carolina, and at least eight of whom shall be duly licensed practicing attorneys-at-law who are members in good standing of The North Carolina State Bar and the Bar of the (.....) Judicial District. The Board of Trustees shall consist of one *ex officio* member and fourteen regular members. The regular members shall serve a term of two years. The *ex officio* member of the Board of Trustees shall be the duly elected and qualified President of the Bar of the (.....) Judicial District of the State of North Carolina. Such *ex officio* Trustee shall serve a term co-extensive with the term of his office entitling him to membership on the Board of Trustees of this Society and his successors in office shall succeed him as a Trustee of this Society. Regular Trustees shall be elected by vote of this Board of Trustees and each Trustee, upon the expiration of his term of office, shall be immediately eligible for re-election. All Trustees shall serve the terms stated above and until their successors are elected and qualify.

Any regular Trustee (but not the *ex officio* Trustee) may be immediately removed from office by a two-thirds vote of the remaining Trustees taken at any regular meeting or at a special meeting of the Board of Trustees shall promptly be filled by vote of the remaining Trustees.

As many as eight Trustees present at any meeting duly called will constitute a quorum for the transaction of business; provided, however, that a majority of any quorum shall be Trustees who are members in good standing of The North Carolina State Bar and the Bar of the (.....) Judicial District. The Board of Trustees shall hold a meeting at least once in a calendar year.

VII

The officers of the Society shall be: A President, who must be a member in good standing of The North Carolina State Bar, and the Bar of the (.....) Judicial District, a Vice-President, who must also be a member in good standing of The North Carolina State Bar, and the Bar of the (.....) Judicial District, a Secretary, and a Treasurer. The Board of Trustees may also elect one or more Assistant Secretaries and one or more Assistant Treasurers. Any two or more offices may be held by the same person, except the offices of President and Secretary. All officers shall serve terms of one year and until their successors shall be elected and qualify. Each officer shall be immediately eligible for re-election upon the expiration of his term. All officers shall be elected at large by the Board of Trustees, except that the President and Vice-President shall be elected from the membership of the Board. Any officer may be removed by a majority vote of the members present at any meeting of the Board of Trustees called for such purpose at which time a quorum is present. Vacancies occurring in any manner in any of the offices of the Society shall promptly be filled by a vote of the Trustees.

VIII

A committee, composed of the President of the Society, the immediate Past-President of the Society and the *ex officio* Trustee who is President of the Bar of

the (.....) Judicial District, shall be denominated the Professional Services Committee. The President of the district bar, at his election, may appoint a Trustee who is a member in good standing of the Bar of the (.....) Judicial District to represent the District Bar, in his stead, on the aforesaid committee. In the event the immediate Past-President of the Society is unable or unwilling to serve on the aforesaid committee, the President of the Society shall appoint a Trustee, who is a member in good standing of the Bar of the (.....) Judicial District, to serve in his stead.

The Professional Services Committee shall:

A. Supervise and exercise control over those operations relating to the practice of law and the attorney-client relationship to insure that the same are conducted in accordance with the General Statutes of North Carolina, the Rules and Regulations and the Canons of Ethics of The North Carolina State Bar.

B. Provide adequate procedures for the determination of indigency and to insure that those procedures are complied with.

C. Insure separation of functions of employees so that those employees not members in good standing of The North Carolina State Bar do not perform functions which should be performed by lawyers.

D. Preserve fully the relationship of attorney and client between applicants for legal services and attorneys employed by the Society.

IX

The Society may:

A. Receive funds from the United Fund, the United States of America, the State of North Carolina, or any other source, provided, that the conditions of the donor regarding the use of such funds do not conflict with the provisions of these Articles of Association and shall disburse funds for the conduct of Legal Aid activities within the approved budget of the Society, provided, that, in no event, shall funds be withheld without the approval of the Professional Services Committee, for the purpose of affecting the professional conduct of an attorney employed by the Society.

B. Permit the examination and audit of its records for the information of the donors of its funds, provided, that such audit shall be limited to determining whether the funds have been used in accordance with conditions which have been imposed by the donor, which are consistent with this Article, and which shall involve no control directly or indirectly of the practice of law or the responsibilities of the attorneys employed by the Society.

X

There shall be a Personnel Committee appointed by the President, composed of six members of the Board of Trustees, four of whom shall be members in good standing of the Bar of the (.....) Judicial District. This committee shall have authority to employ and discharge personnel.

XI

Should this Society ever suffer dissolution, voluntarily or otherwise, or fail to call a meeting of its Board of Trustees for more than twenty-four consecutive months, then, in any such event, all of the assets of this Society of every kind and nature shall devolve upon, vest in, and become the absolute property of (.....) to be used by it for the poor and needy of (.....) County, (.....) District of North Carolina.

XII

These Articles of Association may be amended or repealed and new Articles may be adopted by the affirmative vote of two-thirds or more of the entire Board of Trustees at the time in office at any regular meeting of the Board or at any special

meeting called for that purpose, provided, that such portion of Article VI as provides that eight members of the Board of Trustees must be duly licensed practicing-attorneys who are members in good standing of The North Carolina State Bar, that such portion of Article VII as provides that the President and Vice-President of the Board of Trustees must be a member in good standing of The North Carolina State Bar, Articles VIII, IX, X, and Article XII shall not be amended.

IN TESTIMONY WHEREOF, the undersigned, being the initial Board of Trustees named above, have hereunto set their hands and seals this the day of, 19.....

.....	(SEAL)	.....	(SEAL)
.....	(SEAL)	.....	(SEAL)
.....	(SEAL)	.....	(SEAL)
.....	(SEAL)	.....	(SEAL)
.....	(SEAL)	.....	(SEAL)
.....	(SEAL)	.....	(SEAL)
.....	(SEAL)	.....	(SEAL)
.....	(SEAL)	.....	(SEAL)

h. Committee on Professional Corporations of not less than five nor more than seven Councilors to be selected by the President.

I

Authority, Scope and Definitions

1.1. Chapter 55B of the General Statutes of North Carolina, being “The Professional Corporation Act,” and particularly Section 55B-12, read in connection with G.S. 55B-2 (4), authorizes the Council of The North Carolina State Bar to adopt regulations for professional corporations practicing law. These Regulations are adopted by the Council pursuant to this authority.

1.2. These Regulations only supplement the basic statutory law governing professional corporations (Chapter 55B) and shall be interpreted in harmony with this statute and with other statutes and laws governing corporations generally.

1.3. “Council” means the Council of The North Carolina State Bar.

“Licensee” means any natural person who is duly licensed to practice law in North Carolina.

“Professional corporations” means professional corporations organized for the purpose of practicing law in North Carolina.

“Secretary” means the Secretary of The North Carolina State Bar.

II

Name of Professional Corporation

2.1. The name of every professional corporation shall contain the surname of one or more of its shareholders or of one or more persons who were associated with its immediate corporate, individual or partnership predecessor in the practice of law and shall not contain any other name, word or character (other than punctuation marks and conjunctions) except as required by Section 2.3.

2.2. Upon proper authorization, the surname of any bona fide shareholder may be retained in the corporate name after his death or his retirement or inactivity because of age or disability, even though he may have disposed of his stock.

2.3. The name of a professional corporation shall end with the words “Professional Association” or “P.A.”.

2.4. A professional corporation may not use any name other than its corporate name, except as required or permitted by statute or rule of Court.

2.5. If a living shareholder in a professional corporation whose surname appears in the corporate name becomes a “disqualified person” as that term is defined in the Professional Corporation Act, the name of the professional corporation shall

be promptly changed to eliminate the name of such shareholder, and such shareholder shall promptly dispose of his stock in the corporation.

2.6. If a shareholder in a professional corporation whose surname appears in the corporate name becomes a federal judge or a judge of the District Court, Superior Court, or Court of Appeals of North Carolina or a Justice of the Supreme Court of North Carolina or holds any other office which disqualifies him to practice law, the name of the professional corporation shall be promptly changed to eliminate the name of such shareholder and such person shall promptly dispose of his stock in the corporation.

III

Prerequisites for Incorporation

3.1. The incorporators, whether one or more, of a professional corporation shall be attorneys at law duly licensed to practice in North Carolina. Before filing the Articles of Incorporation with the Secretary of State, the incorporators shall file with the Secretary of The North Carolina State Bar the original Articles of Incorporation, an additional executed copy, and a conformed copy, together with a registration fee of Fifty Dollars (\$50.00).

3.2. The original Articles of Incorporation, the executed copy, and the conformed copy shall each be accompanied by a certificate (P. C. Form 1) to The North Carolina State Bar verified by all incorporators, setting forth the names and addresses of each person who is an incorporator and of each person who will be an original licensed officer, director, shareholder or employee, and stating that all such persons are duly licensed to practice law in North Carolina, and representing that the corporation will be conducted in compliance with the Professional Corporation Act and these Regulations. The number of shares to be owned by each original shareholder need not be stated.

3.3. The original Articles of Incorporation, the executed copy and the conformed copy shall also be accompanied by a form of certificate (P. C. Form 2) for the Secretary to sign, certifying that each of the incorporators and each of the persons who will be original shareholders is duly licensed to practice law in North Carolina. It shall be the duty of the Secretary to review the Articles of Incorporation for compliance with the laws relating to professional corporations and with these Regulations. If the Secretary shall determine that all incorporators and all persons who will be original shareholders are duly licensed to practice law in North Carolina and that the Articles of Incorporation conform with the law relating to professional corporations and with these Regulations, he shall execute said certificate (P. C. Form 2) on the original Articles of Incorporation, on the executed copy and on the conformed copy and return the original and the conformed copies to the incorporators for filing with the Secretary of State. The executed copy of the Articles of Incorporation with the certificates (P. C. Forms 1 and 2) shall be retained in the office of The North Carolina State Bar as a permanent record. If the Articles of Incorporation are thereafter in any manner changed before being filed with the Secretary of State, they shall be re-submitted to the Secretary and shall not be filed with the Secretary of State until approved by the Secretary.

IV

Certificate of Registration

4.1. If the Secretary makes the findings necessary to execute the certificate specified in Section 3.3 and finds that no disciplinary action is pending before the Council against any of the licensed incorporators or persons who will be officers, directors, shareholders or employees of such corporation and it appears to him that such corporation will be conducted in compliance with the law and these Regulations, he shall issue a Certificate of Registration (P. C. Form 3) for the professional corporation to become effective only when the professional corporation actually becomes a corporation upon filing the Articles of Corporation with the Secretary of

State. If the Secretary is unable to make the required findings, he shall refund the registration fee to the incorporators.

4.2. The initial Certificate of Registration shall remain effective until July 1 following the date of registration.

4.3. The Certificate of Registration may be renewed from year to year thereafter for years ending June 30, upon written application (P. C. Form 4) to the Secretary, certifying the names and addresses of all licensed officers, directors, shareholders and employees of the corporation and representing that the corporation has complied with these Regulations and the provisions of the Professional Corporation Act and a finding by the Secretary that the facts stated in the certificate and the representations are correct. The application shall be accompanied by a renewal fee of Twenty-Five Dollars (\$25.00).

V

Stock and Financial Matters

5.1. All directors and the chief executive officer of a professional corporation shall be attorneys at law duly licensed to practice in North Carolina.

5.2. A professional corporation may acquire and hold its own stock.

5.3. No person other than a licensee shall exercise any authority whatsoever over professional matters.

5.4. The income of a professional corporation attributable to its practice of law during the time that a living shareholder is a "disqualified person" as defined in G.S. 55B-2 (1) or after he becomes an officeholder as specified in Section 2.6 shall not in any manner accrue to the benefit of such shareholder or his shares.

5.5. Subject to the provisions of G.S. 55B-7, a professional corporation may make such agreement with its shareholders or its shareholders may make such agreement between themselves as they may deem just for the acquisition of the shares of a deceased or retiring shareholder who becomes disqualified to own shares under the Professional Corporation Act or under these Regulations.

5.6. There shall be prominently displayed on the face of all certificates of stock in a professional corporation a legend that any transfer of these shares is subject to the provisions of the Professional Corporation Act of North Carolina and the Regulations of the Council of The North Carolina State Bar issued pursuant thereto.

VI

General and Administrative Provisions

6.1. These Regulations shall be administered by the Secretary, subject to review and supervision by the Council. The Council may from time to time appoint such standing or special committees as it may deem proper to deal with any matter affecting the administration of these Regulations. It shall be the duty of the Secretary to bring to the attention of the Council or its appropriate committee any violation of the law or of these Regulations affecting professional corporations.

6.2. If the Secretary shall decline to execute the certificate required by Section 3.3, or to issue a Certificate of Registration required by Section 4.1, or renew the same when properly requested, or shall refuse to take any other action required of him in writing by a professional corporation, the aggrieved party may in writing request a review of such action by the Council, and the Council shall provide a formal hearing for such aggrieved party through a committee of its members, and such hearing shall be reported upon the request of and at the expense of the aggrieved party.

6.3. All amendments to and restated charters of professional corporations and all merger and consolidation agreements to which a professional corporation is a party and all dissolution proceedings and similar changes in the corporate structure of a professional corporation, duly certified by the Secretary of State, shall be filed with the Secretary within ten (10) days after filing with the Secretary of State.

6.4. A professional corporation shall notify the Secretary in writing within ten (10) days after service of process upon it of any action, civil or criminal, against the professional corporation, alone or as a co-defendant, and at the same time supply the Secretary with a true copy of the complaint or other pleading containing such claim. The professional corporation shall thereafter, upon request, supply the Secretary with copies of all subsequent pleadings, orders, judgments, proceedings on appeal and other information reasonably required to keep the Secretary informed of the progress and result of such litigation.

6.5. Except as otherwise provided in these Regulations, all reports or papers required by law or by these Regulations to be filed with the Council shall be accompanied by a filing fee of Two Dollars (\$2.00).

6.6. The Secretary is authorized to issue the certificate (P. C. Form 5) required by G.S. 55B-6 when stock is transferred in a professional corporation, and such certificate shall be permanently attached to the stub of the transferee's certificate in the stock book of the professional corporation. The fee for such certificate shall be Two Dollars (\$2.00) for each name included in the certificate. The stock books of the corporation shall be kept at the principal office of the corporation and shall be subject to inspection by the Secretary or his delegate during business hours at the principal office of the corporation.

6.7. The Secretary shall keep a file for each professional corporation which shall contain the executed Articles of Incorporation, all amendments thereto, and other actions affecting its corporate structure required by Section 4.3, and all action taken by the Secretary or by the Council or by any committees of the Council with respect to such professional corporation, all reports made by such corporation to the Council, and the date thereof, and all other documents relating to the affairs of the corporation.

6.8. All fees provided for in these Regulations shall be the property of The North Carolina State Bar and shall be deposited by the Secretary to its account, and such account shall be separately stated on all financial reports made by the Secretary to the Council and on all financial reports made by the Council.

6.9. The corporation shall furnish to the Secretary from time to time such information and documents relating to the administration of these Regulations as the Secretary or the Council may reasonably request.

P. C. Form 1

VII
FORMS

CERTIFICATE OF INCORPORATORS
AND
APPLICATION FOR CERTIFICATE OF REGISTRATION

The undersigned, being all of the incorporators of
a professional corporation about to be incorporated under the laws of North Carolina for the purpose of practicing law, hereby certify to the Council of The North Carolina State Bar:

1. All persons who are incorporators and all persons who, to the best of our knowledge and belief, will be original officers, directors, shareholders and employees who will practice law for said corporation are duly licensed to practice law in North Carolina. The names and addresses of all such persons are:

Name	Address
.....
.....
.....
.....
.....

2. To the best of our knowledge and belief, no disciplinary action is pending or threatened in any jurisdiction against any of the persons listed above.

3. We represent that the corporation will be conducted in compliance with The Professional Corporation Act and with the Regulations of the Council of The North Carolina State Bar.

4. Application is hereby made for a Certificate of Registration to become effective when the Articles of Incorporation are filed with the Secretary of State. Attached hereto is check for \$50.00 for the registration fee.

.....

Incorporator

.....

Incorporator

.....

Incorporator

.....

Incorporator

.....

Incorporator

NORTH CAROLINA
..... COUNTY
I HEREBY CERTIFY THAT,
.....,
..... and
.....,
being incorporators of,
personally appeared before me this day and stated that they had read the foregoing Certificate of Incorporators and Application for Certificate of Registration and that the statements contained therein are true.

Witness my hand and notarial seal, this day of
....., 19.....

.....

Notary Public

My commission expires:
.....

This form is designed to furnish the information necessary for the Secretary's certificate (P. C. Form 2) required by G.S. 55B-4 and as an application for the first Certificate of Registration (P. C. Form 3) required by G.S. 55B-10. See Regulations 3.2 and 4.1.

P. C. Form 2

CERTIFICATION BY COUNCIL OF THE
NORTH CAROLINA STATE BAR

The incorporators of
have certified to the Council of The North Carolina State Bar the names and addresses of all persons who will be original owners of its shares.

Based upon that certificate and my examination of the roll of attorneys at law licensed to practice in North Carolina, which roll is maintained in my office, I hereby certify that each person who will be an original owner of shares in said corporation is duly licensed to practice law in North Carolina.

This certificate is executed under the authority of the Council of The North Carolina State Bar, this day of, 19.....

.....

Secretary of The North Carolina State Bar

This certificate is required by G.S. 55B-4 (4) and must be attached to the original Articles of Incorporation when filed with the Secretary of State. See Regulations 3.3.

for Renewal of Certificate of Registration and that the statements contained therein are true.

Witness my hand and notarial seal, this day of 19.....

.....
Notary Public

My commission expires :
.....

G.S. 55B-11 requires application for annual renewal of Certificate of Registration. See Regulations 4.3.

P. C. Form 5

*CERTIFICATION BY COUNCIL OF THE
NORTH CAROLINA STATE BAR
FOR TRANSFER OF STOCK*

I hereby certify that
(Transferee)

is duly licensed to practice law in North Carolina; and as of this date may be a transferee of stock in a professional corporation formed to practice law in North Carolina.

This certificate is executed under the authority of the Council of The North Carolina State Bar, this day of 19.....

.....
Secretary of The North Carolina State Bar

This certificate is required by G.S. 55B-6. It must be permanently attached to the stub of the transferee's certificate of stock. See Regulations 6.6.

ARTICLE VII.

Office of The North Carolina State Bar.

§ 1. **Office.**—Until otherwise ordered by the Council, the office of The North Carolina State Bar shall be maintained in the city of Raleigh at such place as may be designated by the Council.

ARTICLE VIII.

Board of Law Examiners.

§ 1. **Election.**—At the first meeting of the Council, it shall elect as members of the Board of Law Examiners, two members of the State Bar to serve for a term of one year from July 1, 1933; and two members of the State Bar to serve for a term of two years from July 1, 1933; and two members of the State Bar to serve for a term of three years from July 1, 1933.

The Council, at its regular meeting, in April of each year, beginning in 1934, shall elect two members of the Board of Law Examiners to take office on the 1st day of July of the year in which they are elected and such members shall serve for a term of three years, or until their successors are elected and qualified.

Beginning with the year 1935 and every third year thereafter the Council shall elect 3 members for a term of three years or until their successors are elected and qualified.

No member of the Council shall be a member of the Board of Law Examiners, and no member of the Board of Law Examiners shall be a member of the Council.

§ 2. **Examination of Applicants for License.**—All applicants for admission to the Bar shall first obtain a certificate or license from the Board of Law Examiners in accordance with the rules and regulations of that Board.

§ 3. **Admission to Practice.**—Upon receiving license to practice law from the Board of Law Examiners, the applicant shall be admitted to the practice thereof by taking the oath in the manner and form now provided by law.

§ 4. **Approval of Rules and Regulations of Board of Law Examiners.**—The Council shall, as soon as possible, after the presentation to it of rules and regulations for admission to the Bar, approve or disapprove such rules and regulations. The rules and regulations approved shall immediately be certified to the Supreme Court. Such rules and regulations as may not be approved by the Council shall be the subject of further study and action, and for the purpose of study, the Council and Board of Law Examiners may sit in joint session. No action, however, shall be taken by the joint meeting, but each shall act separately, and no rule or regulation shall be certified to the Supreme Court until approved by the Council.

ARTICLE IX.

Discipline and Disbarment of Attorneys.

§ 1. **Action on Report of Grievance Committee.**—Upon the receipt of the report of the Grievance Committee, and its recommendations, the Council will determine at a regular meeting, its course in reference to the matters recommended by the Grievance Committee and shall adopt, modify, reject or remand the said report to the Grievance Committee for further investigation, but no judgment shall be entered against any accused attorney except after a hearing has been had thereon, as provided in Art. 4, Chapter 84, of the General Statutes, and herein, unless the accused attorney shall waive such hearing.

§ 2. **Procedure on Hearing.**—In case the Council decides to direct a hearing upon the matters, or any of them, so reported by the Grievance Committee, the following procedure shall be followed:

(a) At the quarterly meeting of the Council at which a hearing of the accused attorney is ordered, the Council shall name and designate a trial committee of not less than three Councillors. If the accused attorney does not elect to be heard by a trial committee designated by the Supreme Court of North Carolina or demand a trial in the Superior Court at a regular term for trial of civil cases by a judge and jury, or by written agreement of all parties, trial by jury being waived and facts being found by the judge, as provided by Chapter [G.S.] 84-28 and these regulations, the trial committee named and designated by the Council shall be the trial committee for the hearing of the charges preferred against such accused attorney, and shall sit at the hearing and preside over all proceedings had thereat. The names of the Councillors designated by the Council for such purpose shall not be made public or disclosed to the accused attorney until the time within which such accused attorney may elect to be tried by a trial committee designated by the Supreme Court or a trial by jury in the Superior Court as provided by statute shall have expired.

If such accused attorney exercises his right to be tried by a trial committee designated by the Supreme Court or demand a trial in the Superior Court, as provided by statute, such election shall automatically discharge as trial committee Councillors as theretofore designated by the Council, and thereafter, the accused attorney shall be notified by the Secretary of the Council the personnel of such trial committee appointed by the Supreme Court or certification shall be made to the Clerk of the Superior Court of the county in which such person shall reside if he resides in this state, or to the Clerk of the Superior Court of Wake County if he does not reside in this state, as the case may be.

The trial committee hearing the charges against the accused attorney, whether it be the committee appointed by the Supreme Court or by the Council, shall proceed under the rules and regulations adopted by the Council and the statutory provisions governing such hearings.

(b) As expeditiously as possible following the adjournment of such quarterly meeting of the Council at which a hearing of the accused attorney was ordered a verified written complaint shall be formulated by the Council, or under its direction, showing in separate paragraphs the nature and substance of all charges preferred against such accused attorney, and approved by the Council.

The complaint shall be accompanied by a notice, notifying said attorney that he may, pursuant to the provisions of Chapter [G.S.] 84-28 of the General Statutes of North Carolina, elect to be heard before a trial committee appointed for that purpose by the Council, or a trial committee designated by the Supreme Court, or demand a trial in the Superior Court at a regular term for the trial of civil cases by a judge and a jury or by written agreement of all parties, trial by jury be waived and the facts found by the judge; further notifying said attorney to make his election in his answer; and further notifying said attorney that upon his failure to do so, he shall be conclusively deemed to have waived his right to such election and will be heard by a trial committee appointed by the Council.

The complaint and notice shall be served by the Sheriff of the county in which said attorney resides, by delivering to him two copies of said notice and complaint. The Secretary of the Council shall pay to such Sheriff for such service, from the funds of The North Carolina State Bar such fees as may be allowed in his county for the service of summons in civil actions.

(c) The attorney, within thirty (30) days immediately following service of notice and statement of charges upon him as hereinbefore provided, may file a verified answer to the charges set out in said complaint, the original of which and two copies thereof shall within said period, be filed in the office of the Secretary of The North Carolina State Bar. Every material allegation of the verified complaint not controverted by the answer or to which no answer is made, for the purpose of the action, shall be taken as true and the trial committee may consider the facts therein contained as conceded and no other proof of the same shall be necessary.

(d) The trial committee appointed by the Council, or the Supreme Court, as the case may be, following the filing of the answer by the accused attorney, if an answer be filed, and if no answer be filed, then following the expiration of the time for filing answer, shall proceed to hear the charges preferred against the accused attorney as promptly as possible in order that the ends of justice may be served, and the rights of the accused attorney and of the public generally may be fully protected and preserved. The Chairman of the trial committee shall set a time and place for said hearing, and thereafter, not less than ten (10) days prior to the date thereof, the Secretary of The North Carolina State Bar shall cause notice of the time and place of such hearing to be given said accused attorney by certified or registered mail.

(e) At such hearing, and throughout the pendency of such charges, the respondent shall be entitled to counsel; to have process to secure and compel the attendance of witnesses, the production of papers and books, documents and, upon request, the same shall be issued as prescribed in Art. 4, Chapter 84, of the General Statutes. All process officers in the State of North Carolina shall be required to serve the same, and for such service shall receive fees allowed in their respective jurisdictions for the service of subpoenas issued by the Superior Courts.

(f) At said hearing, or hearings, a complete stenographic report of all testimony shall be had and the original and one copy of said testimony shall be filed with the Secretary of the Council.

(g) The cost of stenographic services for such trial shall be paid by the Council upon bills rendered and approved as other expenses of the Council, and shall be

taxed as a part of the costs, as provided in Art. 4, Chapter 84, of the General Statutes.

(h) At said hearing, or hearings, before said committee, respondent shall have the right to produce in his behalf all competent evidence and to testify in person in respect to the matters and things set out in said statement and notice.

(i) Counsel shall have the right to submit oral argument and written briefs under the direction of the said committee, and to present such arguments as may now be presented in the trial of civil actions in the Superior Court.

(j) After hearing all the evidence and considering the same, the said committee shall file its report, stating its findings of fact and making its conclusions thereon as to discipline or disbarment, or as to the innocence of the respondent. Said report in duplicate shall be filed with the Secretary of the Council and shall stand for hearing at the next regular meeting of the Council, but the Council shall have power to continue the hearing to specified dates.

(k) When the said Committee shall formulate its report, a copy thereof shall be sent, by certified or registered mail, to the respondent, and said respondent shall file his exceptions thereto with the Secretary of The North Carolina State Bar within ten (10) days from receipt of the copy of said report.

(l) The President of The North Carolina State Bar is empowered to extend the time provided herein for the filing of complaint, the filing of answer thereto, the time for filing exceptions by the accused attorney, or his counsel, to the report of the trial committee, or to the action of the Council upon such report, as in his discretion, he may deem necessary, in order that the ends of justice may be met, having due regard to the rights of the respondent to have a full and ample opportunity to present his defense, but also having due regard to the speedy conclusion of such hearing.

(m) Said Council shall consider said report at a regular meeting and shall determine upon the record of the said hearing, which shall consist of the said statement and notice served on the respondent, his answer, if any, the testimony taken by the said committee, its report, recommendations, and the briefs of counsel filed before said committee, if any, and when the same is considered by the Council, the said respondent shall be entitled to be heard by the Council in person or through counsel, before determination, but no testimony or evidence will be taken by the Council and none heard other than such as is contained in the record filed by the committee which conducted the hearings.

(n) Any evidence, discovered after the report of the committee hearing the matter has been filed with the Council, may be the subject of a motion before the Council at any time before final judgment to remand the said report to the committee, to the end that the said committee may hear said newly discovered evidence. Such motion, and the proof with respect thereto, shall be made and heard under the rules now applicable to motions for new trials in the Superior Court for newly discovered evidence in civil actions, and if the said report is remanded to said committee to hear newly discovered evidence, then the same shall be heard by said committee, subject to its competency, and such other evidence as may be corroborative or contradictory thereof, may also be submitted, and the said committee shall include said newly discovered evidence in its report and shall make further findings and recommendations as it may deem proper in the light of all the evidence. Notice of such motion shall be given to opposing counsel at least ten days before said motion is to be heard.

(o) Upon such record, after hearing the argument thereon, the Council shall render its judgment as authorized in Art. 4, Chapter 84, of the General Statutes, and amendments thereto, at a regular meeting, notice of which meeting shall be given the respondent, who shall have the right to be present in person or through counsel.

(p) From any judgment or suspension from the practice, or disbarment, the said respondent may appeal, as provided in Art. 4, Chapter 84, of the General Stat-

utes, and notice of such appeal shall be sufficiently given the said Council, if given orally, when said judgment is rendered at a meeting of said Council, or by service of written notice of the same on the Secretary-Treasurer thereof, within fifteen days from the rendition of said judgment by said Council, which fifteen days shall begin to run from the final adjournment of the meeting of said Council at which said judgment was rendered. A copy of said judgment duly certified by the Secretary-Treasurer shall be forthwith mailed to the respondent by registered letter, with return receipt requested.

(q) The record on appeal to the Superior Court shall consist of the statement and notice and answer, if any, and the transcript of the evidence, and the findings of fact and recommendations of the committee, and the findings and conclusions of the Council thereon, as well as the exceptions, if any, filed to the report of said committee by the respondent, and the judgment of the Council thereon and the assignments of error therein, as contended for by the respondent.

(r) The Secretary-Treasurer shall certify the evidence in question-and-answer form as taken at the hearing, to the Superior Court, on appeal, which appeal shall be sent to the Clerk of the Superior Court in the county of the residence of the respondent.

(s) Whenever charges shall have been preferred against any member of the Bar, and the Council shall have directed a hearing upon the charges, it shall also designate a member or members of the Bar to prosecute said charges in such hearings as may be held, including hearings upon appeals in the Superior and Supreme Courts. The Council may allow the counsel performing such services such compensation as it may deem proper.

(t) The Grievance Committee is charged with the duty of following the progress of all disciplinary matters coming before it and the progress of all hearings ordered by the Council, and shall make report to the Council at its regular quarterly meetings of the status of all hearings theretofore ordered by it, to the final conclusion thereof.

(u) In the case of persons charged with an offense cognizable by the Council, or any committee thereof, a complete record of the proceedings and evidence taken before the Council or any committee thereof shall be made and preserved in the office of the Secretary-Treasurer and the Secretary-Treasurer shall see that such record is had and preserved according to the orders of the Council

The Council may, upon sufficient cause shown, and with the consent of the person charged, cause the said record to be expunged and destroyed.

(v) Final judgment of suspension from the practice or disbarment by the Council shall be certified by the Secretary-Treasurer to the Superior Court of the county wherein the respondent resides, and also to the Supreme Court of North Carolina. If the judgment of the Council shall be that the respondent be privately reprimanded, the Council shall formulate the reprimand and shall appoint one of its members to read and deliver the same and shall name the time and place for delivery thereof. The Secretary shall spread upon his minutes as a final judgment of the Council, the order of private reprimand, the name of the member of the Council to deliver the same, and the time and place therefor.

(w) Whenever any attorney has been deprived of his license under the provisions of Art. 4, Chapter 84, of the General Statutes, the Council, in its discretion, may restore said license upon due notice being given and hearing had and satisfactory evidence produced of proper reformation of the licentiate before restoration.

(x) Due notice of motion before said Council to restore such license shall, insofar as it relates to the Council, be had by serving a written notice upon the Secretary-Treasurer of the Council by delivery of two copies thereof at least forty days prior to the hearing on said motion. In lieu of service the said Secretary-Treasurer may, in his discretion, accept service of said notice. Notice by publication shall also be made by applicant in a newspaper published in the county in which applicant resides once a week for four successive weeks.

(y) All hearings to restore licenses shall be had by the Council which shall make its findings and declare its conclusions thereon and enter its judgment upon the same. If, as a result of said hearing, the Council decides to restore said license, a copy of its judgment restoring the same shall be certified to the Superior Court of the county wherein the said licentiate resides, and if he then resides in a county other than the county where the judgment disbarring said licentiate has been recorded, then a copy shall be certified to the Superior Court in said county where said judgment of disbarment has been recorded, and a certified copy thereof shall be delivered to the Supreme Court, to the end that the same may be recorded in its minutes, and when so recorded the judgment of the Council restoring said license shall have full force and effect throughout the State.

(z) The cost of any proceedings for the restoration of license shall be paid by the person making application therefor.

§ 3. **Nature and Place of Hearing.**—All hearings on any complaint before the committee appointed by the Council or the Supreme Court to hear the same shall be public, and if possible, shall be held in the courthouse.

ARTICLE X.

Filing Papers with and Serving The North Carolina State Bar.

§ 1. **When Papers Are Filed under These Rules and Regulations.**—Whenever in these rules and regulations there is a requirement that petitions, notices or other documents be filed with or served on The North Carolina State Bar, or the Council, the same shall be filed with or served on the Secretary of The North Carolina State Bar.

ARTICLE XI.

Seal.

§ 1. **Form and Custody of Seal.**—The North Carolina State Bar shall have a seal round in shape and having the words and figures, "The North Carolina State Bar—July 1, 1933," with the word "Seal" in the center. The seal shall remain in the custody of the Secretary-Treasurer at the office of The North Carolina State Bar, unless otherwise ordered by the Council.

Appendix VII. Canons of Ethics of The North Carolina State Bar

Canon

1. The Duty of the Lawyer to the Courts.
2. The Selection of Judges.
3. Attempts to Exert Personal Influence on the Court.
4. When Counsel for an Indigent Prisoner.
5. The Defense or Prosecution of Those Accused of Crime.
6. Adverse Influences and Conflicting Interests.
7. Professional Colleagues and Conflicts of Opinion.
8. Advising Upon the Merits of a Client's Cause.
9. Negotiations with Opposite Party.
10. Acquiring Interest in Litigation.
11. Dealing with Trust Property.
12. Fixing the Amount of the Fee.
13. Contingent Fees.
14. Suing a Client for a Fee.
15. How Far a Lawyer May Go in Supporting a Client's Cause.
16. Restraining Clients from Improprieties.
17. Ill-Feeling and Personalities Between Advocates.
18. Treatment of Witnesses and Litigants.
19. Appearance of Lawyer as Witness for His Client.
20. Discussion in Newspaper or Other Medium of Communication of Pending Litigation.
21. Punctuality and Expedition.
22. Candor and Fairness.
23. Attitude Toward Jury.
24. Right of Lawyers to Control the Incidents of the Trial.
25. Taking Technical Advantage of Opposite Counsel; Agreements with Him.
26. Professional Advocacy Other than Before Courts.
27. Advertising, Direct or Indirect.
28. Stirring Up Litigation, Directly or Through Agents.
29. Upholding the Honor of the Profession.
30. Justifiable and Unjustifiable Litigations.
31. Responsibility for Litigation.
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33. Partnerships—Names.
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35. Intermediaries.
36. Retirement from Judicial Position or Public Employment.
37. Confidences of a Client.
38. Compensation, Commissions and Rebates.
39. Newspapers.
40. Discovery of Imposition and Deception.
41. Expenses.
42. Approved Law Lists.
43. Withdrawal from Employment as Attorney or Counsel.
44. Specialists.
45. Notice of Specialized Legal Service.
46. Aiding the Unauthorized Practice of Law.
- A. Practice by Judge.
- B. Practice by Solicitor.
- B-1. Practicing in Court Where Special Relationships Exist with Judge or Solicitor.
- C. Acceptance of Employment by Attorney Who Is or Has Been Prosecuting Officer,
Presiding Judge, Recorder or Vice-Recorder.

- D. District Solicitor, Judge or Solicitor of Criminal Court Appearing in Other Courts.
- E. Attorney Having Interest in Appearance Bond or Bonding Company.
- F. Competitive Bidding for Legal Work.
- G. Client Identified with Claim Which Attorney Has Investigated or Adjusted for Insurer.
- H. Practicing in Court Presided Over by Spouse.
- I. Giving Judicial or Public Officer, Agency or Institution as Reference in Directory.
- J. Name in Directory in Bold-Face Type.
- K. Representing Adverse Parties in Criminal and Civil Matters Arising Out of the Same Incidents.

Preamble

No code or set of rules can be framed which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life. The enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned.

1. The Duty of the Lawyer to the Courts

It is the duty of the lawyer to maintain towards the Courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected.

2. The Selection of Judges

It is the duty of the Bar to endeavor to prevent political considerations from outweighing judicial fitness in the selections of Judges. It should protest earnestly and actively against the appointment or election of those who are unsuitable for the Bench; and it should strive to have elevated thereto only those willing to forego other employments, whether of a business, political or other character, which may embarrass their free and fair consideration of questions before them for decision. The aspiration of lawyers for judicial position should be governed by an impartial estimate of their ability to add honor to the office and not by a desire for the distinction the position may bring to themselves.

3. Attempts to Exert Personal Influence on the Court

Marked attention and unusual hospitality on the part of a lawyer to a Judge, uncalled for by the personal relations of the parties, subject both the Judge and the lawyer to misconstructions of motive and should be avoided. A lawyer should not communicate or argue privately with the Judge as to the merits of the pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a Judge special personal consideration or favor. A self-respecting independence in the discharge of professional duty, without denial or diminution of the courtesy and respect due the Judge's station, is the only proper foundation for cordial, personal and official relations between Bench and Bar.

4. When Counsel for an Indigent Prisoner

A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf.

5. The Defense or Prosecution of Those Accused of Crime

It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound, by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.

The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.

6. Adverse Influences and Conflicting Interests

It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance or retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

7. Professional Colleagues and Conflicts of Opinion

A client's proffer of assistance of additional counsel should not be regarded as evidence of want of confidence, but the matter should be left to the determination of the client. A lawyer should decline association as colleague if it is objectionable to the original counsel, but if the lawyer first retained is relieved, another may come into the case.

When lawyers jointly associated in a cause cannot agree as to any matter vital to the interest of the client, the conflict of opinion should be frankly stated to him for his final determination. His decision should be accepted unless the nature of the difference makes it impracticable for the lawyer whose judgment has been overruled to cooperate effectively. In this event it is his duty to ask the client to relieve him.

Efforts, direct or indirect, in any way to encroach upon the employment of another lawyer, are unworthy of those who should be brethren at the Bar; but, nevertheless, it is the right of any lawyer, without fear or favor, to give proper advice to those seeking relief against unfaithful or neglectful counsel, generally after communication with the lawyer of whom the complaint is made.

8. Advising Upon the Merits of a Client's Cause

A lawyer should endeavor to obtain full knowledge of his client's cause before advising thereon, and he is bound to give a candid opinion of the merits and probable result of pending or contemplated litigation. The miscarriages to which justice is subject, by reason of surprises and disappointments in evidence and witnesses, and through mistakes of juries and errors of Courts, even though only occasional, admonish lawyers to beware of bold and confident assurance to clients, especially where the employment may depend upon such assurance. Whenever the controversy will admit of fair adjustment, the client should be advised to avoid or to end the litigation.

9. Negotiations with Opposite Party

A lawyer should not in any way communicate upon the subject or controversy

with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.

10. Acquiring Interest in Litigation

The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting.

11. Dealing with Trust Property

The lawyer should refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client.

Money of the client or collected for the client or other trust property coming into the possession of the lawyer should be reported and accounted for promptly, and should not under any circumstances be commingled with his own or be used by him.

12. Fixing the Amount of the Fee

In fixing fees, lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge, or even none at all. The reasonable requests of brother lawyers, and of their widows and orphans without ample means, should receive special and kindly consideration.

In determining the amount of the fee, it is proper to consider: (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other employment while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

In determining the customary charges of the Bar for similar services, it is proper for a lawyer to consider a schedule of minimum fees adopted by a Bar Association, but no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fee.

In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.

13. Contingent Fees

Contracts for contingent fees, both in criminal and civil cases, unless forbidden by law, are recognized and approved.

14. Suing a Client for a Fee

Controversies with clients concerning compensation are to be avoided by the lawyer so far as shall be compatible with his self-respect and with his right to receive reasonable recompense for his services; and lawsuits with clients should be resorted to only to prevent injustice, imposition or fraud.

15. How Far a Lawyer May Go in Supporting a Client's Cause

Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause.

It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause.

The lawyer owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense. But it is steadfastly to be borne in mind that the great trust of the lawyers is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicanery. He must obey his own conscience and not that of his client.

16. Restraining Clients from Improprieties

A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards Courts, judicial officers, jurors, witnesses and suitors. If a client persists in such wrongdoing the lawyer should terminate their relation.

17. Ill-Feeling and Personalities Between Advocates

Clients, not lawyers, are the litigants. Whatever may be the ill-feeling existing between clients, it should not be allowed to influence counsel in their conduct and demeanor toward each other or toward suitors in the case. All personalities between counsel should be scrupulously avoided. In the trial of a cause it is indecent to allude to the personal history or the personal peculiarities and idiosyncrasies of counsel on the other side. Personal colloquies between counsel which cause delay and promote unseemly wrangling should also be carefully avoided.

18. Treatment of Witnesses and Litigants

A lawyer should always treat adverse witnesses and suitors with fairness and due consideration, and he should never minister to the malevolence or prejudices of a client in the trial or conduct of a cause. The client cannot be made the keeper of the lawyer's conscience in professional matters. He has no right to demand that his counsel shall abuse the opposite party or indulge in offensive personalities. Improper speech is not excusable on the ground that it is what the client would say if speaking in his own behalf.

19. Appearance of Lawyer as Witness for His Client

When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client.

20. Discussion in Newspaper or Other Medium of Communication of Pending Litigation

Publications, directly or indirectly, by a lawyer in any newspaper, magazine or by television, radio or other mediums of communication, as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement.

21. Punctuality and Expedition

It is the duty of the lawyer not only to his client, but also to the Courts and to the public to be punctual in attendance, and to be concise and direct in the trial and disposition of causes.

22. Candor and Fairness

The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness.

It is not candid or fair for the lawyer to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a textbook; or with knowledge of its invalidity, to cite as authority a decision that has been overruled, or a statute that has been repealed; or in argument to assert as a fact that which has not been proved, or in those jurisdictions where a side has the opening and closing arguments to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

It is unprofessional and dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes.

A lawyer should not offer evidence which he knows the Court should reject, in order to get the same before the jury by argument for its admissibility, nor should he address to the Judge arguments upon any point not properly calling for determination by him. Neither should he introduce into an argument, addressed to the court, remarks or statements intended to influence the jury or bystanders.

These and all kindred practices are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of aiding in the administration of justice.

23. Attitude Toward Jury

All attempts to curry favors with juries by fawning, flattery or pretended solicitude for their personal comfort are unprofessional. Suggestions of counsel, looking to the comfort or convenience of jurors, and propositions to dispense with argument, should be made to the court out of the jury's hearing. A lawyer must never converse privately with jurors about the case; and both before and during the trial he should avoid communicating with them, even as to matters foreign to the cause.

24. Right of Lawyers to Control the Incidents of the Trial

As to incidental matters pending the trial, not affecting the merits of the cause, or working substantial prejudice to the rights of the client, such as forcing the opposite lawyer to trial when he is under affliction or bereavement; forcing the trial on a particular day to the injury of the opposite lawyer when no harm will result from a trial at a different time; agreeing to an extension of time for signing a bill of exceptions, cross interrogatories and the like, the lawyer must be allowed to

judge. In such matters no client has a right to demand that his counsel shall be illiberal, or that he do anything therein repugnant to his own sense of honor and propriety.

25. Taking Technical Advantage of Opposite Counsel; Agreements with Him

A lawyer should not ignore known customs or practice of the Bar or of a particular Court, even when the law permits, without giving timely notice to the opposing counsel. As far as possible, important agreements, affecting the rights of clients, should be reduced to writing; but it is dishonorable to avoid performance of an agreement fairly made because it is not reduced to writing, as required by rules of Court.

26. Professional Advocacy Other than Before Courts

A lawyer openly, and in his true character may render professional services before legislative or other bodies, regarding proposed legislation and in advocacy of claims before departments of government, upon the same principles of ethics which justify his appearance before the Courts; but it is unprofessional for a lawyer so engaged to conceal his attorneyship, or to employ secret personal solicitations, or to use means other than those addressed to the reason and understanding, to influence action.

27. Advertising, Direct or Indirect

The customary use of simple professional cards is permissible. Publication in approved law lists and legal directories, in a manner consistent with the standard of conduct imposed by these Canons, of brief biographical data is permissible. This may include only a statement of the lawyer's name and the names of his professional associates, addresses, telephone numbers, cable addresses, special branches of the profession practiced, date and place of birth and admission to the Bar, schools attended with dates of graduation and degrees received, public offices and posts of honor held, Bar and other Association memberships and, with their consent, the names of clients regularly represented. This does not permit solicitation of professional employment by circulars, or advertisements, or by personal communications or interviews not warranted by personal relations. It is unprofessional to endeavor to procure professional employment through touters of any kind. Indirect advertisements for professional employment, such as furnishing or inspiring newspaper comments, or procuring his photograph to be published in connection with causes in which the lawyer has been or is engaged or concerning the manner of their conduct, the magnitude of the interest involved, the importance of the lawyer's position, and all other like self-laudation, offend the traditions and lower the tone of our profession and are reprehensible.

28. Stirring Up Litigation, Directly or Through Agents

It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit or collect judgment, or to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office, or to remunerate policemen, court or prison officials, physicians, hospital attaches or

others who may succeed, under the guise of giving disinterested friendly advice, in influencing the criminal, the sick and the injured, the ignorant or others, to seek his professional services. A duty to the public and to the profession devolves upon every member of the Bar having knowledge of such practices upon the part of any practitioner immediately to inform thereof, to the end that the offender may be disbarred.

29. Upholding the Honor of the Profession

Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client. The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of prosecuting authorities. The lawyer should aid in guarding the Bar against the admission to the profession of candidates unfit or unqualified because deficient in either moral character or education. He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.

30. Justifiable and Unjustifiable Litigations

The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong. But otherwise it is his right, and, having accepted retainer, it becomes his duty to insist upon the judgment of the Court as to the legal merits of his client's claim. His appearance in Court should be deemed equivalent to an assertion on his honor that in his opinion his client's case is one proper for judicial determination.

31. Responsibility for Litigation

No lawyer is obliged to act either as adviser or advocate for every person who may wish to become his client. He has the right to decline employment. Every lawyer upon his own responsibility must decide what employment he will accept as counsel, what causes he will bring into Court for plaintiffs, what cases he will contest in Court for defendants. The responsibility for advising as to questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instructions.

32. The Lawyer's Duty in Its Last Analysis

No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. Correspondingly, he advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But above all a lawyer will find his highest

honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.

33. Partnerships—Names

Partnerships among lawyers for the practice of their profession are very common and are not to be condemned. In the formation of partnerships and the use of partnership names care should be taken not to violate any law, custom, or rule of court locally applicable. Where partnerships are formed between lawyers who are not all admitted to practice in the courts of the State, care should be taken to avoid any misleading name or representation which would create a false impression as to the professional position or privileges of the member not locally admitted. In the formation of partnerships for the practice of law, no person should be admitted or held out as a practitioner or member who is not a member of the legal profession duly authorized to practice, and amenable to professional discipline. In the selection and use of a firm name, no false, misleading, assumed or trade name should be used. The continued use of the name of a deceased or former partner, when permissible by local custom, is not unethical, but care should be taken that no imposition or deception is practiced through this use. When a member of the firm, on becoming a judge, is precluded from practicing law, his name should not be continued in the firm name.

Partnerships between lawyers and members of other professions or nonprofessional persons should not be formed or permitted where any part of the partnership's employment consists of the practice of law.

34. Division of Fees

No division of fees for legal services is proper, except with another lawyer, based upon a division of services or responsibility.

This Canon, however, shall not preclude a law firm, by written agreement among its members, from providing for the sale by one partner of his interest, including good will, in the partnership, to the remaining members of the firm; and/or by written agreement may provide for retirement pay to a retiring partner upon such terms as to the remaining members of the firm may seem just and proper, and in such contract may provide for death benefits to his widow or to his estate, or both.

35. Intermediaries

The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client. Charitable societies rendering aid to the indigents are not deemed such intermediaries.

A lawyer may accept employment from any organization, such as an association, club or trade organization, to render legal services in any matter in which the organization, as an entity, is interested, but this employment should not include the rendering of legal services to the members of such an organization in respect to their individual affairs.

36. Retirement from Judicial Position or Public Employment

A lawyer should not accept employment as an advocate in any matter upon the merits of which he has previously acted in a judicial capacity.

A lawyer, having once held public office or having been in the public employ,

should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ.

37. Confidences of a Client

It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that his obligation prevents the performance of his full duty to his former or to his new client.

If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation. The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened.

38. Compensation, Commissions and Rebates

A lawyer should accept no compensation, commissions, rebates or other advantages from others without the knowledge and consent of his client after full disclosure.

39. Newspapers

A lawyer may with propriety write articles for publications in which he gives information upon the law; but he should not accept employment from such publications to advise inquirers in respect to their individual rights.

40. Discovery of Imposition and Deception

When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps.

41. Expenses

A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement.

42. Approved Law Lists

It shall be improper for any attorney to permit his name to be published in a law list that is not approved by the Council of The North Carolina State Bar, after April 16, 1948.

43. Withdrawal from Employment as Attorney or Counsel

The right of an attorney or counsel to withdraw from employment, once assumed, arises only from good cause. Even the desire or consent of the client is not always sufficient. The lawyer should not throw up the unfinished task to the detriment of his client except for reasons of honor or self-respect. If the client insists upon an unjust or immoral course in the conduct of his case, or if he persists over the attorney's remonstrance in presenting frivolous defenses, or if he deliberately dis-

regards an agreement or obligation as to fees or expenses, the lawyer may be warranted in withdrawing on due notice to the client, allowing him time to employ another lawyer. So also when a lawyer discovers that his client has no case and the client is determined to continue it; or even if the lawyer finds himself incapable of conducting the case effectively. Sundry other instances may arise in which withdrawal is to be justified. Upon withdrawing from a case after a retainer has been paid, the attorney should refund such part of the retainer as has not been clearly earned.

44. Specialists

The Canons apply to all branches of the legal profession; specialists in particular branches are not to be considered as exempt from the application of these principles.

45. Notice of Specialized Legal Service

Where a lawyer is engaged in rendering a specialized legal service directly and only to other lawyers, a brief, dignified notice of that fact, couched in language indicating that it is addressed to lawyers, inserted in legal periodicals and like publications, when it will afford convenient and beneficial information to lawyers desiring to obtain such service, is not improper.

46. Aiding the Unauthorized Practice of Law

No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate.

A. Practice by Judge

It shall be deemed unethical and unprofessional for a member of The North Carolina State Bar who is the Judge or Assistant Judge of any court inferior to the Superior Court to practice criminal law in any criminal court of the State.

B. Practice by Solicitor

It shall be deemed unethical and unprofessional for a member of The North Carolina State Bar who is the Solicitor, Assistant Solicitor or Substitute Solicitor of any court to practice criminal law in any criminal court of the State.

B-1. Practicing in Court Where Special Relationships Exist with Judge or Solicitor

It shall be deemed unethical and unprofessional for a member of The North Carolina State Bar who is the partner or the associate or who occupies office space, or who shares office expenses with any Judge or Assistant Judge to practice criminal law in any criminal court of any such Judge or Assistant Judge or in any criminal court of the judicial district in which such Judge or Assistant Judge holds his judicial office, or for any member of The North Carolina State Bar who is the partner or the associate or who occupies office space, or who shares office expenses, with any Solicitor, Assistant Solicitor or Substitute Solicitor of any criminal court of the State to practice criminal law in any criminal court of such Solicitor, Assistant Solicitor or Substitute Solicitor or in any criminal court of the solicitorial district in which such Solicitor, Assistant Solicitor or Substitute Solicitor holds his solicitorial office.

C. Acceptance of Employment by Attorney Who Is or Has Been Prosecuting Officer, Presiding Judge, Recorder or Vice-Recorder

It shall be deemed unethical and unprofessional for any attorney who is, or has been, a prosecuting officer, or presiding Judge, or Recorder, or Vice-Recorder in

any court inferior to the Supreme Court, or in any Federal Court, to accept professional employment in any matter of a civil or criminal nature, growing out of any matter or thing which is, or has been in any way connected with the office of such prosecuting officer, Judge, or Recorder, or Vice-Recorder, during his incumbency.

**D. District Solicitor, Judge or Solicitor of Criminal Court
Appearing in Other Courts**

It shall be deemed unethical for any District Solicitor, Judge or Solicitor of any criminal court inferior to the Superior Court to appear in any criminal proceeding, whether for the defendant or for the State, in other courts of the State of North Carolina having criminal jurisdiction, whether concurrent with, inferior to or superior to the criminal jurisdiction of the court over which he shall preside, or over which he shall be the prosecuting officer. Provided that nothing in this Canon is intended to preclude the Solicitor of any Recorder's Court or County Court from appearing in the Superior Court upon the request of the District Solicitor. And provided further that nothing in this Canon is intended to preclude the Solicitor or Assistant Solicitor of any Superior Court from appearing in a Recorder's Court or Municipal-County Court, upon request of the Solicitor of such court.

**E. Attorney Having Interest in Appearance Bond
or Bonding Company**

It shall be deemed unethical and unprofessional for any attorney to represent any defendant in any criminal action where such attorney or member of his family has personally signed an appearance bond with or without compensation or wherein he has acted as agent or officer for, or is financially interested in, any person, firm, or corporation in executing such bond.

When any member of The North Carolina State Bar shall be financially interested, either directly or indirectly, in any bonding company authorized to write appearance bonds for any person charged with violation of the criminal laws of the State of North Carolina, or whenever such member of The North Carolina State Bar shall be regularly retained and employed as attorney for such bonding company, neither shall said member nor any partnership of attorneys with whom he is associated, or by whom he is employed, be permitted to represent as attorney any person charged with a criminal offense or a misdemeanor, whose appearance bond shall have been written with such bonding company as surety thereon for the appearance of said person in any court of the State.

It shall likewise be deemed unethical and improper for any attorney to represent any party in any civil action where such attorney or a member of his family has personally signed any cost or other bond with or without compensation.

F. Competitive Bidding for Legal Work

That it appearing to the Council that the United States Government has called for competitive bidding from lawyers to do abstract work and that upon the request of the Government lawyers have submitted competitive bids for such work—and the question having been raised as to whether such bidding is ethical—NOW, therefore, be it resolved that it is the sense of this Council that hereafter any competitive bidding for any legal work is deemed to be unethical.

**G. Client Identified with Claim Which Attorney
Has Investigated or Adjusted for Insurer**

When any member of The North Carolina State Bar shall investigate or adjust any claim for any insurance company or agency, or through the service of any

other person, such member, his associates, and the person making such investigation are forbidden to represent as attorney any person, firm, or corporation in anywise identified with said claim, as a result of the facts or circumstances on account of which said claim originated, except the insurance company or agency for which the aforesaid claim was investigated or adjusted, or the assured. Provided, nothing contained herein shall prevent a member of the State Bar or his associates, in the event he or they shall institute suit in behalf of such insurance company or agency on account of the facts and circumstances so investigated, from filing a replication to any answer which may be filed in said cause and set up a counterclaim or cross action in behalf of such insurance company or agency or its assured, who may be involved in such action, or from filing answer, in the event of suit, setting up counterclaim or cross action in behalf of the insurance company by which he is employed, or its insured, for any property damage or personal injuries which may have been sustained by the insured and growing out of the facts and circumstances investigated. And provided further that this Canon shall not apply to the representation of any person charged with a criminal offense in any court of the State and who may be prosecuted on account of the facts and circumstances originally investigated.

This Canon shall not be applicable to any case referred by an insurance company or agency to a member of The North Carolina State Bar for handling by such member after the insurance company's claimsman or adjuster has completed an investigation, and in such cases the member of The North Carolina State Bar shall be governed by the provisions of Canons 6, 28 and 35.

H. Practicing in Court Presided Over by Spouse

It shall be deemed unethical and unprofessional for a member of The North Carolina State Bar to practice his or her profession in the Superior Court, or any Recorders Court, Municipal Court, Domestic Relations Court, Juvenile Court, Probate Court, or any other court inferior to the Supreme Court of North Carolina, now established or which may be hereafter established, which court is presided over by his or her spouse.

I. Giving Judicial or Public Officer, Agency or Institution as Reference in Directory

It shall be deemed unethical and improper for any member of The North Carolina State Bar to give or include as a reference, in his biographical sketch which he causes to be inserted in a legal directory, the name of any judicial or public officer, agency or institution in North Carolina.

J. Name in Directory in Bold-Face Type

Hereafter it shall be improper for an attorney to have his name printed in any directory in bold-face type.

K. Representing Adverse Parties in Criminal and Civil Matters Arising Out of the Same Incidents

From and after April 16, 1965, it shall be deemed improper and unethical for any attorney or his partners or associates to represent a party in a civil action whose interest is adverse to that of a person or parties for whom he or any of them appeared in a criminal action when the said civil action involves the same transactions or occurrences as those involved in the criminal action, provided this Canon shall not affect pending litigation.

Appendix VIII. Regulations Relating to the Appointment of Counsel for Indigent Defendants in Certain Criminal Cases

As Provided by G.S. 7A-451, Enacted by Chapter 1013 of the Session Laws of 1969

Article

- I. Authority.
- II. Determination of Indigency.
- III. Waiver of Counsel.
- IV. Appointment of Counsel.

Article

- V. Withdrawal by Counsel.
- VI. Procedure for Payment of Compensation.

ARTICLE I.

Authority.

Section 1.1. These Rules and Regulations are issued pursuant to the authority contained in Section 7A-459, Chapter 1013 of the Session Laws of 1969.

ARTICLE II.

Determination of Indigency.

Section 2.1. Prior to the appointment of counsel on grounds of indigency, the Court shall require the defendant to complete and sign under oath an Affidavit of Indigency in a form approved by the Director of the Administrative Office of the Courts.

Section 2.2. Prior to the call of the case for trial, the judge shall make reasonable inquiry of the defendant personally under oath to determine the truth of the statements made in the Affidavit of Indigency.

Section 2.3. The defendant's Affidavit of Indigency shall be filed in the records of the case.

Section 2.4. Upon the basis of the defendant's Affidavit of Indigency, his statements to the Court on this subject, and such other information as may be brought to the attention of the Court which shall be made a part of the record in the case, the Court shall determine whether or not the defendant is in fact indigent.

ARTICLE III.

Waiver of Counsel.

Section 3.1. Any defendant desiring to waive the right to counsel as provided in Section 7A-457 shall complete and sign under oath a Waiver of Counsel in a form approved by the Director of the Administrative Office of the Courts. If such defendant waives the right to counsel but refuses to execute such waiver, the Court shall so certify in a form approved by the Director of the Administrative Office of the Courts.

Section 3.2. Prior to the call of the case for trial, the Judge shall make reasonable inquiry of the defendant personally to determine that the defendant has understandingly waived his right to counsel.

Section 3.3. The Judge, upon being so satisfied, shall accept the Waiver of Counsel executed by the defendant, sign the same and cause it to be filed in the record of the case.

ARTICLE IV.

Appointment of Counsel.

Section 4.1. Any district bar as provided in G.S. 84-18, provided this shall not apply to the Twelfth and Eighteenth Judicial Districts, shall adopt a plan for the naming and designation of the attorneys to serve as assigned counsel. Such plan may be applicable to the entire district, or, at the election of the district bar, separate plans may be adopted by the district bar for use in each separate county within the district.

Section 4.2. Such plan or plans as adopted by the district bar, shall be certified to the Clerk of Superior Court of each county to which each plan is applicable and shall constitute the method by which counsel shall be selected in said district for appointment as counsel to indigent defendants. Thereafter all appointments of counsel for indigent defendants in said district shall be made in conformity with such plan or plans, unless the trial judge in the exercise of his sound discretion deems it proper in furtherance of justice to appoint as a counsel for an indigent defendant or defendants some lawyer or lawyers residing and practicing in the judicial district, who is or are not on the plan or list certified to the Clerk of Superior Court, and if so, he is authorized to appoint as counsel to represent an indigent defendant some lawyer or lawyers not on said plan or list residing and practicing in the judicial district.

Section 4.3. No attorney shall be appointed as counsel for an indigent defendant in a court of any district except the district in which he resides or maintains an office except by consent of counsel so appointed.

Section 4.4. No indigent defendant shall be entitled or permitted to select or specify the attorney who shall be assigned to defend him.

Section 4.5. The Clerk of Superior Court of each county shall file or record in his office, maintain and keep current the plan for the assignment of counsel applicable to said county as certified to him by the district bar in which such county is located.

Section 4.6. The Clerk of Superior Court of each county shall keep a record of all counsel eligible for appointment under the plan applicable to said county as certified to him by the district bar and a permanent record of the appointments made under said plan.

Section 4.7. Orders for the appointment of counsel shall be entered by the court in a form approved by the Director of the Administrative Office of the Courts.

ARTICLE V.

Withdrawal by Counsel.

Section 5.1. At any time during or pending the trial or re-trial of a case, the trial Judge, the appointing judge, or the resident judge of the district, upon application of the attorney, and for good cause shown, may permit said attorney to withdraw from the defense of the case.

Section 5.2. At any time after the trial of a case and during the pendency of an appeal, the trial attorney, for good cause shown, may apply to the Appellate Court for permission to withdraw from the defense of the case upon the appeal.

Section 5.3. Applications for permission to withdraw as counsel shall be made only for good cause where compelling reasons or actual hardship exists.

Withdrawal Where Counsel Finds Appeal Wholly Frivolous or Lacking in Merit.—In appeals wholly frivolous or simply lacking in merit, counsel should avoid the dilemma of deciding between his professional and personal integrity as an attorney and the right of the defendant to the assistance of counsel. *Virgil v. Harris*, 299 F. Supp. 509 (E.D.N.C. 1969).

If a court-appointed counsel finds an appeal to be wholly frivolous and desires to be released of further responsibility, he should apply to the Supreme Court of North Carolina for permission to withdraw as appellate counsel. If this statutory procedure is followed, the Supreme Court of North Carolina could determine by the application of State and federal requirements whether the appeal is wholly frivolous, and whether to grant counsel's request to withdraw and dismiss the appeal, or proceed to a decision on the merits. *Virgil v. Harris*, 299 F. Supp. 509 (E.D.N.C. 1969).

There is a distinction between cases that are wholly frivolous in which counsel may be permitted to withdraw, and those apparently lacking in merit, but presenting

arguable questions. *Virgil v. Harris*, 299 F. Supp. 509 (E.D.N.C. 1969).

If a court-appointed counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds, it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal. *Virgil v. Harris*, 299 F. Supp. 509 (E.D.N.C. 1969).

ARTICLE VI.

Procedure for Payment of Compensation.

Section 6.1. Upon completion of the representation of an indigent defendant by appointed counsel in the trial court, the trial judge shall, upon application enter an order allowing such compensation as is provided in Section 7A-458.

Section 6.2. Upon the completion of any appeal, the trial judge, the resident judge or the judge holding the courts of the district, shall, upon application, enter a supplemental order in the cause allowing the appointed attorney upon the appeal such additional compensation as may be appropriate.

Section 6.3. Orders for the payment of compensation to counsel for representation of indigent defendants shall be entered by the judge in a form approved by the Director of the Administrative Office of the Courts.

Section 6.4. Two certified copies of the order for the payment of fees shall be forwarded by the clerk of the Superior Court to the Administrative Office of the Courts, Attention: Assistant Director, Raleigh, North Carolina, for payment.

Section 6.5. Upon the entry of the order for the payment of counsel fees, the court shall upon final conviction likewise enter a judgment against the defendant for whom counsel was assigned in the amount allowed as counsel fees, said judgment to be in the form approved by the Director of the Administrative Office of the Courts.

Appendix IX. Rules Governing Admission to Practice of Law

(Approved by the Supreme Court November 7, 1970.)

Rule

1. Compliance Necessary.
2. Definitions.
3. Applicants.
4. Registration.
5. Applications of General Applicants.
6. Requirements for General Applicants.
7. Requirements for Comity Applicants.

Rule

8. Moral Character.
 9. Educational Requirements.
 10. Protest.
 11. Examinations.
 12. Certificate or License.
 13. Appeals.
- Appendix A

RULE I

Compliance Necessary

Section 1. No person shall be admitted to the practice of law in North Carolina unless he has complied with these rules and the laws of the State.

RULE II

Definitions

Section 1. The term "Board" as herein used refers to the "Board of Law Examiners of North Carolina".

Section 2. The term "Secretary" as herein used refers to the Secretary of the Board of Law Examiners of North Carolina.

RULE III

Applicants

Section 1. For the purpose of these rules, applicants are classified either as "general applicants" or as "comity applicants". To be classified as a "general applicant" and certified as such for admission to practice law, an applicant must satisfy the requirements of Rule VI hereof. To be classified as a "comity applicant" and certified as such for admission to practice law, a person shall satisfy the requirements of Rule VII hereof.

Section 2. As soon as possible after the filing date for applications, the Secretary shall make public a list of both general and comity applicants for the ensuing examination.

RULE IV

Registration

Section 1. Every person seeking admission to practice law in the State of North Carolina as a general applicant shall register, by filing with the Secretary, upon forms prescribed by the Board.

Section 2. Each registration form shall be complete in every detail and must be accompanied by such other evidence or documents as may be prescribed by the Board.

Section 3. Registrations shall be filed with the Secretary at least eighteen (18) months prior to August 1 of the year in which the applicant expects to take the bar examination.

Section 4. Each registration by a resident of the State of North Carolina must be accompanied by a fee of \$10.00 and each registration by a nonresident shall be accompanied by a fee of \$25.00. An additional fee of \$25.00 shall be charged all applicants who file a late registration, both resident and non-resident. All said fees shall be payable to the Board. No part of a registration fee shall be refunded for any reason whatsoever.

RULE V

Applications of General Applicants

Section 1. After complying with the registration provisions of Rule IV, applications for admission to an examination must be made upon forms supplied by the Board and must be complete in every detail. Every supporting document required by the application form must be submitted with each application.

Section 2. Applications must be received and filed with the Secretary not later than 12:00 o'clock noon, Eastern Standard Time, on the 1st day of March in the year the applicant applies to take the bar examination.

Section 3. Every application by a general applicant shall be accompanied by a fee of \$65.00 payable to the Board.

Section 4. No part of the fee required by Section 3 of this Rule V shall be refunded to the applicant unless the applicant shall file with the Secretary a written request to withdraw as an applicant, not later than the 15th day of June before the next examination, in which event not more than one-half ($\frac{1}{2}$) of the fee may be refunded to the applicant in the discretion of the Board.

RULE VI

Requirements for General Applicants

Section 1. Before being certified (licensed) by the Board to practice law in the State of North Carolina, a general applicant shall:

- (1) Be of good moral character and have satisfied the requirements of Rule VIII hereof;
- (2) Have registered as a general applicant in accordance with the provisions of Rule IV hereof;
- (3) Possess the legal educational qualifications as prescribed in Rule IX hereof;
- (4) Be a citizen of the United States;
- (5) Be of the age of at least twenty-one (21) years;
- (6) Be and continuously have been a bona fide citizen and resident of the State of North Carolina for a period of at least twelve (12) months prior to the date of his bar examination or be and continuously have been a nonresident student attending a law school, approved by the Board, in the State of North Carolina for a full and complete academic year commencing at least ten (10) months immediately prior to the examination date set forth in Section 2 of Rule XI. All nonresident students shall file with the Board a declaration of the applicant's intent, in the form prescribed by the Board, in good faith, to become a citizen and resident of the State of North Carolina;
- (7) Have filed formal application as a general applicant in accordance with Rule V hereof;
- (8) Stand and pass a written bar examination as prescribed in Rule XI hereof.

RULE VII

Requirements for Comity Applicants

Section 1. Any attorney at law immigrating or who has heretofore immigrated to North Carolina from a sister state or from the District of Columbia or a territory of the United States, upon written application, may be certified (licensed) by the Board to practice law in the State of North Carolina, without written examination, in the discretion of the Board, provided each such applicant shall:

- (1) Be a citizen of the United States;
- (2) File written application with the Secretary upon such form as may be prescribed by the Board. All such forms must be complete in every detail and every supporting document required of the applicant by the form must be submitted with the written application;
- (3) Pay to the Board with each written application a fee of \$250.00, not more than \$125.00 of which may be refunded to the applicant in the discretion of the Board, if admission to practice law in the State of North Carolina is denied;
- (4) Be and continuously have been a bona fide citizen and resident of the State of North Carolina for a period of at least twelve (12) months immediately prior to the approval of his application to practice law in the State of North Carolina;
- (5) Proved to the satisfaction of the Board that he has been actively and substantially engaged in the practice of law in the state or states of his former residence during at least five (5) years out of the last eight (8) years immediately preceding the filing of his application with the Secretary. Serving as a judge of a court of record or as a full-time teacher in a law school approved by the Board may be deemed practicing law within the meaning of this rule. Time spent in active military service of the United States, not to exceed five (5) years, may be excluded in computing the eight (8) year period referred to hereinabove;
- (6) Satisfy the Board that the state or states of the applicant's former residence in which he practiced law will admit attorneys, to the practice of law in said states, who are licensed to practice law in the State of North Carolina without a written examination;
- (7) Be in good professional standing in the state of his former residence;
- (8) Furnish to the Board such evidence as may be necessary to satisfy the Board of his good moral character.
- (9) Applicants admitted to the practice of law in another state after August 1971 must meet the educational requirements of Rule IX as hereinafter set out.

Section 2. Every person filing an application under this rule for admission by comity shall be bound by the actions and decisions of the Board, which actions and decisions shall be in the sole discretion of the Board, and the Board's actions on such applications under this rule shall be final.

Section 3. No license shall be issued to any applicant for admission under this Rule VII except at the time of the annual examination of the general applicants, provided the Board, when in session at any other time, may in its discretion grant an interim permission to such comity applicants to practice law until license shall be issued.

RULE VIII

Moral Character

Section 1. Every applicant shall be of good moral character, and the applicant shall have the burden of proving that he is possessed of good moral character, or

removing any and all reasonable suspicion of moral unfitness; and that he is entitled to the high regard and confidence of the public.

Section 2. All information furnished to the Board by an applicant, and all answers and questions upon forms furnished by the Board, shall be deemed material and such forms and information shall be and become a permanent record of the Board.

Section 3. No one shall be certified (licensed) to practice law in this State by examination or comity:

- (1) Who fails to disclose fully to the Board whether requested to do so or not the facts relating to any disciplinary proceedings or charges, as to his professional conduct, whether same have been terminated or not, in this or any other state, or any Federal Court or other jurisdiction, or
- (2) Who fails to disclose fully to the Board, whether requested to do so or not, any and all facts relating to any civil or criminal proceedings, charges, or investigations, whether the same have been terminated or not in this or any other state or in any of the Federal Courts or other jurisdictions.

Section 4. Every applicant shall appear before a Bar Candidate Committee appointed by the Chairman of the Board in the Judicial District in which he resides, or in such other judicial district as the Board in its sole discretion may designate to the candidate, to be examined about any matter pertaining to his moral character. The applicant shall give such information to the Committee as may be required on such forms as may be provided by the Board. A Bar Candidate Committee may require the applicant to make more than one appearance before the Committee and to furnish to the Committee such information and documents as it may reasonably require pertaining to the moral fitness of the applicant to be certified (licensed) to practice law in North Carolina. Each applicant will be advised by the Secretary or the Chairman of such Committee of the time and place of the applicant's appearance before the Bar Candidate Committee.

Section 5. All investigations in reference to the moral character of an applicant may be informal, but shall be thorough, with the object of ascertaining the truth. Neither the hearsay rule, nor any other technical rule of evidence need be observed.

Section 6. Every applicant may be required to appear before the Board to be examined about any matter pertaining to his moral character.

Section 7. No new application, or petition for reconsideration of a previous application, from an applicant who has been denied permission to take the bar examination by the Board on the grounds of failure to prove good moral character shall be considered by the Board within a period of three (3) years next after the date of such denial unless, for good cause shown, permission for re-application or petition for a reconsideration is granted by the Board at the time of such denial. If, after consideration of the new application or a petition for reconsideration, the decision of the Board again is adverse, no further applications or petitions from such applicant shall be considered by the Board more often than once in any twelve (12) month period.

RULE IX

Educational Requirements

Section 1. General Education. Each applicant to take the examination, prior to beginning the study of law, must have completed, at an accredited college or university an amount of academic work equal to $\frac{3}{4}$ of the work required for a

bachelor's degree at the university of the State in which the college is located. With his application he shall file an affidavit from such college furnishing all information that the Board shall require.

Section 2. Every general applicant applying for admission to practice law in the State of North Carolina, before being granted a certificate (license) to practice law, commencing with the examination in August 1971, shall file with the Secretary a certificate from the President, Dean or other proper official of the Law School approved by the Council of The North Carolina State Bar, a list of which is available in the office of the Secretary, or shall otherwise show to the satisfaction of the Board of Law Examiners that the applicant has received a law degree or that the applicant has successfully completed the courses required by the Council of The North Carolina State Bar, being the same courses as those set out in Rule XI, Sec. 3, hereof.

Section 3. The educational requirement in effect immediately prior to the adoption of this Rule IX as set forth in Appendix A, shall apply to all who seek admission to the practice of law in the State of North Carolina, as a general applicant up to and including the examination required by Rule XI in August, 1970.

RULE X

Protest

Section 1. Any person may protest the application of any applicant to be admitted to the practice of law either by examination or as a matter of comity.

Section 2. Such protest shall be made in writing, signed by the person making the protest and bearing his home and business address, and shall be filed with the Secretary prior to the date on which the applicant is to be examined.

Section 3. The Secretary shall notify immediately the applicant of the protest and of the charges therein made; and the applicant thereupon may file with the Secretary a written withdrawal as a candidate for admission to the practice of law at that examination.

Section 4. In case the applicant does not withdraw as a candidate for admission to the practice of law at that examination, the person or persons making the protest and the applicant in question shall appear before the Board at a time and place to be designated by the Board. In the event time will not permit a hearing on the protest prior to the examination, the applicant may take the written examination; however, if the applicant passes the written examination, no certificate (license) to practice law shall be issued to him as provided by Rule XII until final disposition of the protest in favor of the applicant.

Section 5. Nothing herein contained shall prevent the Board on its own motion from withholding its certificate (license) to practice law until it has been fully satisfied as to the moral fitness of the applicant as provided by Rule VIII.

RULE XI

Examinations

Section 1. One written examination shall be held each year for those applying to be admitted to the practice of law in North Carolina as general applicants.

Section 2. The examination shall be held in the City of Raleigh and shall commence on the first Tuesday in August.

Section 3. The examination shall deal with the following subjects: Business Associations (including agency, corporations, and partnerships), Civil Procedure,

Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, Legal Ethics, Real Property, Security Transactions including The Uniform Commercial Code, Taxation, Torts, Trusts, Wills, Decedents' Estates and Equity.

Section 4. The Board shall determine what shall constitute the passing of an examination.

Section 5. No person shall be permitted to take the examination more than five (5) times within any ten (10) year period.

RULE XII

Certificate or License

Section 1. Upon compliance with the rules of the Board, and all orders of the Board, the Secretary, upon order of the Board shall issue a certificate (license) to practice law in North Carolina to each applicant as may be designated by the Board in the form and manner as may be prescribed by the Board, and at such times as prescribed by the Board.

RULE XIII

Appeals

Section 1. Any applicant may appeal from an adverse ruling or determination of the Board of Law Examiners as to his eligibility to take the bar examination. After an applicant has successfully passed the bar examination, he may appeal from any adverse ruling or determination withholding his certificate (license) to practice law from him.

Section 2. Any appealing applicant within ten (10) days after notice of such ruling or determination, shall give notice of appeal in writing and file with the Secretary his written exceptions to the ruling or determination, which exceptions shall state the grounds of objection to such ruling or determination.

Section 3. The record on appeal to the Superior Court shall consist of the following:

- (a) The papers filed by the applicant with the Board under its rules.
- (b) A certified copy of the evidence taken by the Board upon the question or questions appealed.
- (c) The rulings and determinations of the Board.
- (d) The notice of appeal.
- (e) The exceptions.

Within sixty days of receipt of the exceptions filed by the applicant with the Board, the Secretary shall certify such record at the expense of the applicant.

Section 4. Such appeal shall lie to the Superior Court of Wake County and shall be heard by the Presiding Judge, without a jury. The findings of fact by the Board, when supported by evidence or reliable information, shall be conclusive and binding upon the Court. If the Court is of the opinion that the Board was in error, it shall so specify and remand the matter to the Board, which may appeal as hereinafter provided. Such appeal shall operate as a supersedeas. In case no appeal is taken by the Board, it shall proceed in accordance with the judgment of the Court.

Section 5. The said applicant or the Board of Law Examiners, may appeal to the Supreme Court from any order or judgment of the Superior Court. If the said cause is remanded by the Supreme Court to the Superior Court, then the Superior Court shall remand the same to the Board of Law Examiners, to be proceeded with in accordance with the opinion of the Supreme Court.

Appendix X. North Carolina Supreme Court Library Rules

General Provisions

Rule

1. Short Title.
2. Definitions.

Hours and Use of Library

3. Hours.
4. Use during Regular Hours.
5. Use after Hours.
6. Entrance and Exits.
7. Conduct.

Use of Material

8. Clearing of Tables.
9. Abuse of Material.
10. Replacement of Lost Materials.

Services

11. Copy Service, Fees, and Certification.
12. Research Service.

Borrowing and Removing Material

Rule

13. Who May Borrow Material.
14. Return of Borrowed Material.
15. Receipts for Borrowed Material.
16. Borrowing Proscriptions and Limitations.
17. Removal from the Justice Building.
18. Transportation of Material.

Internal Rules

19. Policies and Procedures.

Penalty

20. Contempt of Court.

Records and Annual Report

21. Records and Annual Report.

Pursuant to Section 7A-13 of the General Statutes of North Carolina, the following rules for the North Carolina Supreme Court Library have been approved by the Library Committee and are hereby promulgated:

RULES AND REGULATIONS SUPREME COURT LIBRARY STATE OF NORTH CAROLINA

The following rules and regulations promulgated pursuant to Section 7A-13 of the General Statutes of North Carolina shall apply to the use of the Supreme Court Library:

General Provisions

1. **Short Title.**—The following rules and regulations shall be known and may be cited as North Carolina Supreme Court Library Rules.

2. **Definitions.**—Subject to additional definitions contained in subsequent sections and applicable to specific parts of these Rules, and unless the context otherwise requires, the following definitions shall apply for purposes of these Rules:

(a) "Assistant Librarian" means the Assistant Librarian of the Supreme Court Library.

(b) "Librarian" means the Librarian of the Supreme Court Library.

(c) "Library" means the North Carolina Supreme Court Library.

(d) "Library Committee" means that committee appointed and acting pursuant to Section 7A-13 of the General Statutes of North Carolina.

(e) "Library material" means any book, paper, document, map, magazine, pamphlet, newspaper, manuscript, film, periodical, or other item or material, regardless of physical form or characteristics, that is a part of the collection or holdings of the Library.

(f) "Official Register" means that list of persons and positions that is denominated "Official Register" and that appears in that volume of the Session Laws of North Carolina last published prior to the application of any Rule containing that term.

(g) "Rules" means any rules or regulations contained in the North Carolina Supreme Court Library Rules.

(h) "Staff" means any assistants or other persons or employees appointed by or working under the supervision of the Librarian of the Supreme Court Library.

Hours and Use of Library

3. Hours.—Except when the Library Committee authorizes that it be closed, the Library shall be open for public use Monday through Friday of each week from nine o'clock each morning until five o'clock each afternoon and Saturday from nine o'clock in the morning until twelve o'clock noon.

4. Use during Regular Hours.—Any person who conducts himself in a quiet, orderly, and lawful manner and who abides by the Rules and the reasonable requests of the staff may visit the Library and reasonably use its material to such extent, in such manner, and for such duration as in the discretion of the Librarian or Assistant Librarian reasonably does not or will not interfere with the performance of the Library's primary function of serving the Appellate Division of the General Court of Justice.

5. Use after Hours.—Only the following persons may enter the Library or use the material or facilities of the Library when the Library is not open for public use as provided for by Rule 3:

(a) Members and employees of the Supreme Court and the Court of Appeals.
(b) Members of the North Carolina State Bar, Inc. who have offices in the Justice Building.

(c) Any person who has a valid Library use permit issued under the hand and seal of the Librarian. The Librarian in his discretion may issue Library use permits upon written application in the form prescribed by the Librarian. Each respective Library use permit shall be valid for the period determined by the Librarian in his discretion, but in no event shall a permit be valid for more than two years from the date of its issuance. The Librarian in his discretion may revoke any Library use permit at any time.

6. Entrance and Exits.—All visitors and users of the Library shall enter and leave the Library through an elevator except in emergency situations and times when an elevator is not in operation.

7. Conduct.—Smoking, consumption of food or beverages other than from water fountains in the Library, loud talking, boisterous or disorderly conduct, and the use of dictating equipment shall not be permitted in the Library.

Use of Material

8. Clearing of Tables.—At the end of each day the staff shall clear all tables and reshelvise all unshelved books in the reading area of the Library; however, provided that no books shall be left on tables for more than two consecutive nights, the staff may leave material on tables overnight when the person using the material leaves on it a signed and dated request that it not be reshelved.

9. Abuse of Material.—No person shall damage or abuse any Library material or equipment in any respect. Marking, writing upon, cutting, tearing, defacing, disfiguring, soiling, obliterating, or breaking such material or equipment, or folding pages, closing a book with a writing instrument or other object within it, tearing out or removing any page or pocket part without authority, or stacking other books or heavy objects on an open book are included within this prohibition.

10. Replacement of Lost Materials.—Any person who unintentionally or inadvertently shall lose or misplace any Library material and for that reason fail to return it within the time that it is due to be returned shall, within thirty (30) days from such due date, make such replacement as will be acceptable to the Librarian in his discretion, or pay to the Library the fair value of the material as determined by the Librarian.

Services

11. Copy Service, Fees, and Certification.—The Library shall operate a copy service by means of which it shall furnish requested copies of all or portions of any Library material that legally may be copied, such copies to be furnished subject to the following terms and conditions:

(a) All copies requested by members and employees of the Supreme Court and the Court of Appeals shall be furnished without charge.

(b) Provided that the number of copies requested at any one time does not exceed ten (10) pages, or with the permission of the Librarian or the Assistant Librarian regardless of the number of copies requested, the Library shall furnish without charge such copies as personally are requested by persons holding positions listed in the Official Register and that such persons state are to be used in the discharge of their official duties; however, when the request is for more than ten (10) pages at any one time, or total requests from the same person in any single month exceed fifty (50) pages, the Librarian or Assistant Librarian may require the approval of the Library Committee before making such copies without charge, such approval then to be given only for good cause shown and upon the written and signed application of the person requesting the copies.

(c) Except as provided for in Sections (a) and (b) of this Rule, the Library shall charge and collect a fee of twenty cents (\$.20) per page for each copy that it makes.

(d) The Librarian shall charge and collect a fee of one dollar (\$1.00) for each individual case, statute, or other distinct item that he certifies pursuant to Section 7A-13 (f) of the General Statutes of North Carolina, except that certificates requested by persons holding positions listed in the Official Register shall be provided without charge. Preparation of copies to be certified and the charges therefor, if any, shall be as provided by Sections (a), (b) and (c) of this Rule.

(e) Fees for making or certifying copies shall be paid on or before delivery, except that copies requested by members of the North Carolina State Bar, Inc. may be made and delivered upon the condition that full payment will be made within forty-eight (48) hours after the delivery of the copies.

12. Research Service.—No member of the Library staff shall do law research for or give legal advice or counsel to any person except as requested by a member of the Supreme Court or the Court of Appeals for his own use, or as authorized by the Librarian.

Borrowing and Removing Material

13. Who may Borrow Material.—The following persons only may borrow and remove material from the Library:

(a) Members and employees of the Supreme Court and the Court of Appeals, in person or upon his or her signed memorandum.

(b) The Attorney General and members of his staff who are members of the North Carolina State Bar, Inc., in person or upon his or her signed memorandum.

(c) The Governor and members of the Council of State, in person or upon his or her signed memorandum.

(d) The President of the Senate, the Speaker of the House of Representatives, and the respective chairmen of the committees of the General Assembly, in person or upon his or her signed memorandum.

(e) The heads or duly constituted representatives of established agencies or institutions that offer reciprocal services to the Library and that are engaged in what the Librarian in his discretion deems to be worthy educational, historical, library, archival, or bibliographical activity for which they have a legitimate need to borrow the material requested.

(f) The Secretary of the North Carolina State Bar, Inc., in person or upon his or her signed memorandum, as long as his or her office is in the Justice Building.

APPENDIX X—NORTH CAROLINA SUPREME COURT LIBRARY RULES

14. Return of Borrowed Material.—Material borrowed from the Library shall be returned to the Library within the time provided below:

(a) Members of the Supreme Court and the Court of Appeals shall return borrowed material as early as possible, but in no event shall any item be retained for more than one week from the time of borrowing.

(b) Borrowers who are not members of the Supreme Court or the Court of Appeals shall return borrowed material before the closing of the Library on the day that the item is borrowed except when upon the borrower's written request stating good reason the Librarian or the Assistant Librarian in his or her respective discretion authorizes that any specific item be retained by the borrower until a later time as set by the Librarian or the Assistant Librarian.

15. Receipts for Borrowed Material.—Each person who borrows material from the Library shall give a receipt therefor on a form prescribed for that purpose by the Librarian and available in the Library.

16. Borrowing Proscriptions and Limitations.—The Librarian in his discretion may limit or proscribe the borrowing of old books, rare books, digests, indexes, general reference materials, looseleaf services, encyclopedias, advance sheets, and other materials that because of their particular value, nature, or frequent use should remain in the Library at all times or have only limited circulation.

17. Removal from the Justice Building.—No borrower, except a Judge of the Court of Appeals upon his written request, may remove any Library material from the Justice Building except when each of the following conditions exists:

(a) It is not reasonably possible for the person desiring to use the material to do so within the Justice Building.

(b) It is impracticable to copy the material by use of the facilities available in the Justice Building, or such copies reasonably would not serve the purpose of the person desiring to borrow the material.

(c) Material that is identical or substantially the same may not be borrowed and removed from the North Carolina State Library or any other public library in Raleigh.

(d) The material is not out of print and it reasonably could be replaced.

(e) The Library has more than one copy of the material.

18. Transportation of Material.—Library materials may not be sent through State Interoffice Mail or transported by or through any other person, agency, or means that the Librarian in his discretion deems unsafe.

Internal Rules

19. Policies and Procedures.—The Librarian shall be responsible for the general administration of the Library, and he shall execute the policies established by the Library Committee.

Penalty

20. Contempt of Court.—Any person who intentionally and wilfully violates any North Carolina Supreme Court Library Rule shall, upon formal complaint filed in the Supreme Court by the Librarian, be subject to being adjudged in contempt of the Supreme Court.

Records and Annual Report

21. Records and Annual Report.—The Librarian shall keep Library records in a form acceptable to the Library Committee, and on or before September 1 of each year he shall make to the Supreme Court a summary report of Library activities for the fiscal year that ended on the preceding June 30.

This the 20th day of December, 1967.

RAYMOND M. TAYLOR
Librarian

Appendix XI. Comparative Tables

(1) TABLE OF COMPARABLE SECTIONS OF 1868 CONSTITUTION AND 1970 CONSTITUTION

1868		1970		1868		1970	
Art.	Sec.	Art.	Sec.	Art.	Sec.	Art.	Sec.
Preamble		Preamble					
I	1	I	1	II	15	Omitted	
I	2	I	2	II	16	II	17
I	3	I	3	II	17	II	18
I	4	I	4	II	18	II	15
I	5	I	5	II	19	II	13
I	6	V	3(3)	II	20	II	14
I	7	I	32	II	21	II	21
I	8	I	6	II	22	II	20
I	9	I	7	II	23	II	22
I	10	I	10	II	24	II	12
I	11	I	23	II	25	II	9
I	12	I	22	II	26	II	19
I	13	I	24	II	27	II	8
I	14	I	27	II	28	II	16
I	15	I	20	II	29	II	24
I	16	I	28	II	30	V	6(1)
I	17	I	19	II	31	V	6(2)
I	18	I	21	III	1	III	1,
I	19	I	25,				2(1),
			26				7
I	20	I	14	III	2	III	2(2)
I	21	I	21	III	3	VI	5
I	22	I	11	III	4	III	4
I	23	I	8	III	5	III	5(1),
I	24	I	30				5(2)
I	25	I	12	III	6	III	5(6)
I	26	I	13	III	7	III	5(9),
I	27	I	15				5(4)
I	28	I	9	III	8	III	5(5)
I	29	I	35	III	9	III	5(7)
I	30	I	33	III	10	III	5(8)
I	31	I	34	III	11	III	6
I	32	I	16	III	12	III	3
I	33	I	17	III	13	III	7(2),
I	34	XIV	2				7(3),
I	35	I	18				7(4)
I	36	I	31	III	14	III	8
I	37	I	29	III	15	III	9
I	38	I	36	III	16	III	10
II	1	II	1	III	17	Omitted	
II	2	II	11	III	18	Omitted	
II	3	II	2	IV	1	IV	1
II	4	II	3	IV	2	IV	2
II	5	II	4	IV	3	IV	3
II	6	II	5	IV	4	IV	4
II	7	II	6	IV	5	IV	5
II	8	II	7	IV	6	IV	6
II	9	VI	5	IV	6A	IV	7
II	10	II	24(1)(m)	IV	7	IV	9
II	11	II	24(1)(n)	IV	8	IV	10
II	12	Omitted		IV	9	IV	11
II	13	II	10	IV	10	IV	12
II	14	II	23	IV	11	IV	13

1868		1970		1868		1970	
Art.	Sec.	Art.	Sec.	Art.	Sec.	Art.	Sec.
IV	12	IV	14	IX	1	IX	1
IV	13	IV	15	IX	2	IX	2(1)
IV	14	IV	16	IX	3	IX	2(2)
IV	15	IV	17	IX	4	IX	6
IV	16	IV	18	IX	5	IX	7
IV	17	IV	19	IX	6	IX	8
IV	18	IV	20	IX	7	IX	9,
IV	19	IV	21				10
IV	20	XIV	3	IX	8	IX	4
IV	21	Omitted		IX	9	IX	5
V	1	V	1(1)	IX	10	Omitted	
V	2	V	1(2)	IX	11	IX	3
V	3	V	2(1),	IX	12	Omitted	
			2(2),	X	1	X	1
			2(6)	X	2	X	2(1)
V	4	V	3,	X	3	X	2(2)
			4	X	4	X	3
V	5	V	2(3)	X	5	X	2(3)
V	6	V	2(4)	X	6	X	4
V	7	V	5	X	7	X	5
VI	1	VI	1	X	8	X	2(4)
VI	2	VI	2(1),	XI	1	XI	1
			2(2),	XI	2	XI	2
			2(3)	XI	3	Omitted	
VI	3	VI	3	XI	4	Omitted	
VI	4	VI	4	XI	5	Omitted	
VI	5	Omitted		XI	6	Omitted	
VI	6	VI	5	XI	7	XI	4
VI	7	VI	6, 7	XI	8	Omitted	
VI	8	VI	8	XI	9	Omitted	
VI	9	Omitted		XI	10	Omitted	
VII	1	Omitted		XI	11	Omitted	
VII	2	Omitted		XII	1	Omitted	
VII	3	Omitted		XII	2	Omitted	
VII	4	Omitted		XII	3	XII	1
VII	5	VII	2	XII	4	Omitted	
VII	6	V	2(5),	XIII	1	XIII	1
			4(2)	XIII	2	XIII	4
VII	7	V	7(2)	XIV	1	Omitted	
VII	8	Omitted		XIV	2	Omitted	
VII	9	V	4(3)	XIV	3	V	7(1)
VII	10	Omitted		XIV	4	X	3
VIII	1	VIII	1	XIV	5	VI	10
VIII	2	Omitted		XIV	6	XIV	1
VIII	3	VIII	2	XIV	7	VI	9
VIII	4	VII	1	XIV	8	Omitted	

(2) TABLE OF COMPARATIVE SECTIONS

The numbers preceding the dots refer to sections in the Consolidated Statutes and in Michie's Codes; the numbers following the dots give the corresponding section in the General Statutes of North Carolina. The letters L. M. following the dots indicate that the section is not codified but has been made a local modification citation under the number following the above letters. For table of deleted sections, see Appendix XI, (3).

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4556(12)	15-66	4595	15-123
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(3) TABLE OF DELETED SECTIONS

The sections in this table appeared in the Consolidated Statutes and in the Michie Codes. For sections transferred into sections of the General Statutes, see Appendix XI, (2).

Sections in this table preceded by a star represent the following types of laws which were not codified in the General Statutes of North Carolina: (1) local in application affecting less than ten counties; (2) excepting pending litigation; (3) construction clauses; (4) repealing clauses; (5) partial invalidity clauses. The omission of such statutes does not for that reason repeal them. See General Statutes, sections 164-1 to 164-8.

Where a section was repealed by reference to its corresponding number in the General Statutes such number appears in parentheses following the repealed section.

The following abbreviations have been used in this table: Con. St. = Construction Statute; Loc. = Local; Obs. = Obsolete; P. Inv. = Partial Invalidity; P. Lit. = Pending Litigation; Rep. = Repealed; Rpl. St. = Repealing Statute; Sup. = Superseded; Unconst. = Unconstitutional.

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| § 163. Obs. | § 233. Sup., § 53-58. |
| § 179-181. Obs. | § 234. Sup., § 53-54. |
| § 182-191. Rep., 1935, c. 243. | § 235. Sup., § 53-14. |
| § 191(s) (§ 63-19). Rep., 1943, c. 543. | § 236. Sup., § 53-135. |
| § 193(a)-193(h). Obs. | § 237-239. Obs. |
| § 193(12). Obs. | § 240 (§ 53-147). Rep., 1943, c. 543. |
| § 194-196. Sup., § 84-24. | § 241, 242. Obs. |
| § 204-215. Rep., 1933, c. 210, s. 20. | § 243. Sup., § 53-41. |
| § 216. Sup., § 53-2. | § 244. Sup., § 53-104. |
| § 217. Sup., §§ 53-3 to 53-5. | § 245. Sup., § 53-137. |
| § 217(m)1-217(m)13. Obs. | § 246. Obs. |
| § 218. Sup., § 53-6. | § 247. Sup., §§ 53-106, 53-108. |
| § 218(d). Sup., § 53-20. | § 248. Sup., § 53-107. |
| § 218(r), 218(s). Obs. | § 249. Sup., §§ 53-117, 53-118, 53-122. |
| § 218(u). Obs. | § 250. Sup., §§ 53-122, 53-123. |
| § 218(v). Unconst., 205 N. C. 822, 172 S. E. 484. | § 251. Sup., § 53-125. |
| § 219. Sup., §§ 53-7, 53-8. | § 252. Sup., § 53-122. |
| § 219(a). Obs. | § 253. Sup., §§ 53-20, 53-118. |
| § 219(a)2-219(a)4. Obs. | § 254. Sup., § 53-121. |
| § 219(b). Obs. | § 255. Sup., § 53-136. |
| § 219(d). Obs. | § 256. Sup., § 53-137. |
| § 220. Sup., § 53-43. | § 257. Sup., § 53-139. |
| § 221. Sup., § 53-61. | § 258. Sup., § 53-138. |
| § 221(s). Obs. | § 259. Sup., § 53-141. |
| § 221(u). Obs. | § 260. Sup., § 53-142. |
| § 222(c). Obs. | § 261. Sup., § 53-143. |
| § 222(o). Obs. | § 262. Obs. |
| § 223. Sup., § 53-43. | § 263. Sup., § 53-144. |
| § 224. Sup., § 53-64. | § 264. Sup., § 53-136. |
| § 225. Sup., § 53-60. | § 264(1). Obs. |
| § 225(i), 225(j). Obs. | § 265-276. Rep., 1933, c. 228. |
| § 225(l). Obs. | § *281. P. Lit. |
| § 225(n)-225(r). Obs. | § *282. P. Inv. |
| § 226-229. Sup., §§ 53-1, 53-48, 53-50, 53-51, 53-53, 53-59. | § 360. Obs. |
| § 231. Sup., § 53-52. | § 454. Sup., § 52-1 et seq. |
| § 232. Sup., § 53-57. | § 482. Sup., § 1-94. |
| | § 486. Sup., § 1-121. |
| | § 492(a). Rep., 1927, c. 66, s. 2. |

- § 594. Obs.
 § 597(c). Rep., 1943, c. 301, s. 3.
 § 616(a) (§ 1-238). Rep., 1943, c. 543.
 § 639. Obs.
 § 668. Rep., 1927, c. 24.
 § 694. Obs.
 § 756 (§ 1-397). Rep., 1943, c. 543.
 § 766(b). Rep., 1941, c. 52, s. 3.
 § 858. Sup., §§ 105-267, 105-406.
 § 955. Sup., §§ 114-10, 114-11.
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 § 1023-1034. Rep., 1933, c. 134.
 § 1035. Obs.
 § 1036. Obs.
 § 1065(a). Obs.
 § 1066(a). Obs.
 § 1076. Obs.
 § 1078-1081. Obs.
 § 1084. Obs.
 § 1089. Obs.
 § 1089(a), 1089(b). Obs.
 § 1092. Sup., § 62-12.
 § 1104. Obs.
 § 1112(c). Obs.
 § 1112(f)-1112(j). Obs.
 § 1112(n). Sup., § 62-9.
 § 1112(p), 1112(q). Obs.
 § 1112(t). Obs.
 § 1112(x). Obs.
 § *1112(aa). P. Lit.
 § 1112(bb). Obs.
 § 1122 (§ 55-10). Rep., 1943, c. 543.
 § 1124 (§ 55-12). Rep., 1943, c. 543.
 § 1125(j). Rep., 1935, c. 489, s. 3.
 § 1142 (§ 55-46). Rep., 1943, c. 543.
 § 1148. Obs.
 § 1163, 1164. Rep., 1941, c. 353, s. 24.
 § 1291(a). Obs.
 § 1302(18). Obs.
 § 1316(c). Sup., § 143-129.
 § *1316(d). Con. St.
 § 1321(a)-1321(i). Sup., § 153-69 et seq.
 § 1334(37). Rep., 1931, c. 60, s. 58.
 § 1334(44). Obs.
 § 1334(45)-1334(52). Rep., 1939, c. 310, s. 1725.
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 § 1362. Sup., § 153-194.
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 § 1461(a)-1461(e3). Rep., 1943, c. 746.
 § 1582(a). Obs.
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 § 1605. Rep., 1921, c. 110, s. 15.
 § 1608(f)3(c). Rep., 1933, c. 405.
 § 1608(dd)9. Obs.
 § 1684(a). Rep., 1929, c. 318.
 § 1694(6). Obs.
 § 1694(29). Obs.
 § 1794. Obs.
 § 1796. Obs.
 § 1826. Obs.
 § *1864(o). P. Lit.
 § 1866. Obs.
 § 1876. Obs.
 § 1877. Obs.
 § 1877(a), 1877(b). Obs.
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 § 1917. Sup., § 113-163.
 § 1959(d). Obs.
 § 2016-2019. Rep., 1943, c. 582.
 § 2046. Rep., 1931, c. 365.
 § 2060. Rep., Ex. Sess., 1921, c. 42, s. 5.
 § 2078-2078(o). Sup., §§ 113-143 to 113-157.
 § *2078(aa). Con. St.
 § 2079-2084. Obs.
 § 2085. Sup., § 113-95.
 § 2086. Sup., §§ 113-94, 113-99.
 § 2087-2097. Rep., 1927, c. 51, s. 39.
 § 2098. Sup., §§ 113-95, 113-97, 113-104, 113-109.
 § 2100. Sup., § 113-100.
 § 2101. Sup., §§ 113-83, 113-100, 113-102.
 § 2102. Sup., §§ 113-83, 113-100, 113-102, 113-104, 113-109.
 § 2104. Obs.
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 § 2106. Sup., § 113-106.
 § 2107. Sup., § 113-106.
 § 2108. Sup., § 113-107.
 § 2109. Sup., § 113-100.
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 § 2111-2117. Sup., § 113-100.
 § 2118. Sup., §§ 113-100, 113-102.
 § 2119-2120. Sup., § 113-100.
 § 2121. Sup., §§ 113-100, 113-102.
 § 2122. Sup., §§ 113-104, 113-84, 113-109.
 § 2123. Sup., §§ 113-104, 113-109.
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 § 2129. Sup., §§ 113-101, 113-109.
 § 2130. Sup., §§ 113-106, 113-109.
 § 2131. Sup., §§ 113-105, 113-106, 113-109.
 § 2133. Sup., §§ 113-104, 113-109.
 § 2134. Obs.
 § 2135. Sup., §§ 113-100, 113-106, 113-104, 113-109.
 § 2135(b). Sup., § 113-100.

- § 2135(c). Obs.
 § 2136. Sup., § 113-102.
 § 2137. Sup., §§ 113-100, 113-104.
 § 2138. Sup., 1935, c. 160.
 § 2139. Sup., § 113-95.
 § 2140. Sup., §§ 113-104, 113-109.
 § 2141. Sup., § 113-103.
 § 2141(a). Sup., §§ 113-84, 113-104.
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 § 2141(k). Sup., §§ 113-84, 113-91.
 § 2141(l). Sup., §§ 113-34, 113-84.
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 § 2141(q). Sup., § 113-86.
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 § 2141(bb). Sup., § 113-94.
 § 2141(cc). Obs.
 § 2141(ee). Sup., §§ 113-91, 113-95.
 § 2141(ff). Sup., § 113-97.
 § 2141(gg). Sup., § 113-98.
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 § 2141(jj). Sup., §§ 113-101, 113-102.
 § 2141(jj)1. Sup., § 113-108.
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 § 2145. Rep., 1931, c. 236, s. 2.
 § 2146. Rep., 1931, c. 236, s. 2.
 § *2202(19). P. Inv.
 § 2255-2276. Rep., 1921, c. 186, s. 22.
 § 2278-2283. Rep., 1921, c. 186, s. 22.
 § 2304(g). Obs.
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 § 2434. Obs.
 § 2438 (§ 44-7). Rep., 1943, c. 543.
 § 2492(3)-2492(4). Obs.
 § 2492(46). Obs.
 § 2492(50). Obs.
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 § 2492(62). Obs.
 § 2492(63)-2492(71). Obs.
 § 2500(a)-2500(e). Sup., §§ 51-9 to 51-14.
 § 2500(f). Rep., 1933, c. 12.
 § 2500(g). Sup., §§ 51-9 to 51-14.
 § 2500(n). Rep., 1941, c. 218, s. 2.
 § 2514 (§ 52-11). Rep., 1943, c. 543.
 § 2520 (§ 52-17), 2521 (§ 52-18). Rep., 1943, c. 543.
 § 2594(c). Obs.
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 § 2601. Sup., § 20-169.
 § 2602. Sup., §§ 20-1 to 20-3, 20-39, 20-50 et seq.
 § 2603. Sup., §§ 20-50 et seq.
 § 2604. Rep., 1921, c. 209.
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 § 2611(g). Sup., § 20-84.
 § 2612. Sup., §§ 20-85 et seq.
 § 2612(a). Sup., § 20-97.
 § 2612(b). Obs.
 § 2613. Sup., § 20-97.
 § 2613(a). Sup., §§ 20-50 et seq., 20-176.
 § 2613(b). Sup., § 20-97.
 § 2613(c)-2613(i). Sup., §§ 105-430 et seq.
 § 2613(i)2.c. Sup., §§ 119-41, 119-42.
 § 2613(i)3. Obs.
 § 2613(r). Obs.
 § 2613(z). Rep., 1933, c. 440.

- § 2613(dd). Obs.
 § 2613(ee). Sup., § 62-119.
 § 2614. Sup., §§ 20-9, 20-138.
 § 2615. Sup., §§ 20-124, 20-125, 20-129.
 § 2617. Sup., §§ 20-148, 20-171, 20-149, 20-151, 20-153, 20-154.
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The numbers preceding the dots refer to sections in the Revisal of 1905 and lettered sections in Pell's Revisal of 1908; the numbers following the dots give the corresponding sections in the Consolidated Statutes. This table is reprinted here as it was compiled for use with the Consolidated Statutes. In using this table refer to Appendix VIII, (1), where sections of the Consolidated Statutes have been transferred to sections appearing in the General Statutes of North Carolina.

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817	854	873	908

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902	939	954	999
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5143	7813	5212	7897
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5145	7815	5214	7927
5146	7816	5215	7903
5147	7817	5217	7909
5148	7818	5218	7910
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5150	7820	5220	7915
5151	7820	5221	7916

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5223	7901	5277	7950
5224	7929	5278	7951
5225	7911	5279	7952
5226	7912	5280	7953
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5229	7908	5283	7956
5230	7919	5284	7957
5231	7926	5285	7958
5232	7924	5286	7959
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5238	7930	5291	7964
	7991	5292	7965
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5241	7994	5295	7970
	7995	5296	7989
5242	7996	5297	7363
5243	7873	5298	7364
5244	8040	5299	7365
5245	8042	5300	7366
5246	8043	5301	7367
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5255	7933	5311	5129
5256	7934	5312	5130
5257	7935	5313	5131
5258	7871	5315	7396
5259	7900	5316	7397
5260	7920	5317	7398
5261	8047	5318	7399
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5346	7655	5400	7720
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5359	7669	5411	7759
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STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

December 29, 1970

I, Robert Morgan, Attorney General of North Carolina, do hereby certify that the foregoing volume was prepared and published by The Michie Company under the supervision of the Division of Legislative Drafting and Codification of Statutes of the Department of Justice of the State of North Carolina.

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Attorney General of North Carolina

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